CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 585

JOHN POKORA, PETITIONER,

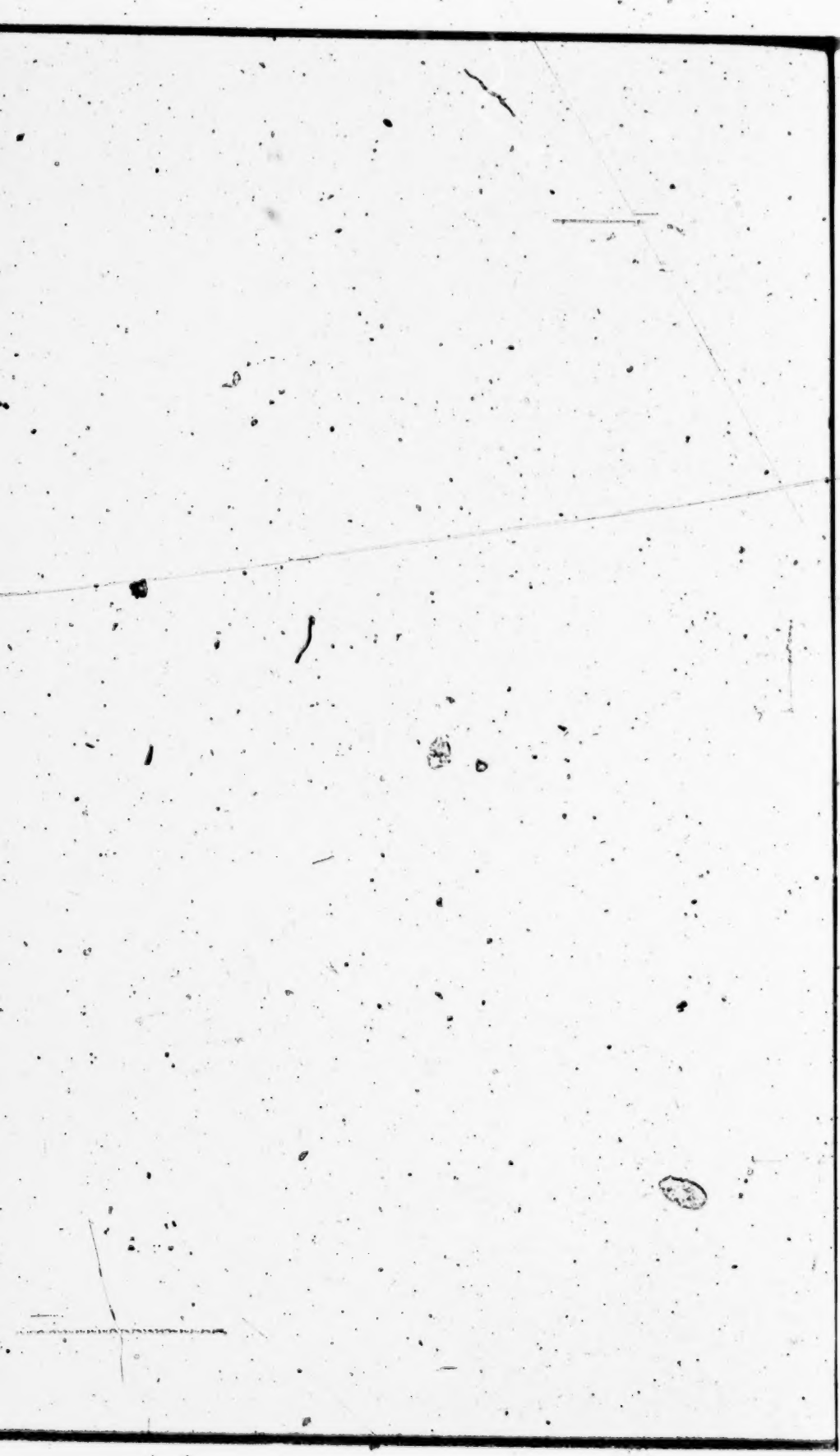
vs.

THE WABASH RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1933

CERTIORARI GRANTED DECEMBER 18, 1933



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vs.

THE WABASH RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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2 Pleas in the district court of the United States of America, within and for the Southern Division of the Southern District of Illinois, held at the City of Springfield in said division and district, before the Honorable Louis Fitz-Henry, Judge of said court, on Monday, the fifth day of January, in the year of our Lord one thousand nine hundred thirty-one, and of the Independence of the United States of America, the one hundred and fifty-fifth year. Placita.

Present:

Louis FitzHenry, District Judge.

Charles W. Cushing, United States Marshal.

Walter M. Provine, United States Attorney.

S. T. Burnett, Clerk.

Attest:

S. T. Burnett, Clerk.

3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

John Pokora,
vs.
The Wabash Railway Company. } Case. No. 18189.

Be it remembered that heretofore to wit: on the 12th day of May, in the year of our Lord one thousand nine hundred thirty-one, that being one of the days of the January Term, A. D. 1931, of the district court of the United States for the Southern Division of the Southern District of Illinois, there was filed in the office of the clerk of said court, a certain transcript of the proceedings in the above-entitled cause in the Circuit Court of Sangamon County, Illinois, which said transcript was and is in the words and figures, following, to wit:

4 State of Illinois, } ss.
Sangamon County. }

Pleas, before the Hon. Chas. G. Briggle, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held in the Court House in the City of Springfield, County and State aforesaid on the first Monday (the same being the fourth day) of May in the year of our Lord One Thousand Nine Hundred and Thirty-one.

Present:

Hon. Chas. G. Briggle, Judge
H. E. Fullenwider, State's Attorney
Samuel T. Metcalf, Sheriff
R. G. Moore, Clerk

5 Be It Remembered that on the 23rd day of April, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain praecipe for summons; a copy of said praecipe being in the words and figures as follows, to-wit:

6 State of Illinois, }
Sangamon County. }

CIRCUIT COURT

May Term, A. D. 1931.

John Pokora,

vs.

The Wabash Railway Company, a Corporation.

Action of Case, Damages $50,000/00

The Clerk will issue summons in the above entitled cause, directed to the Sheriff of said County, returnable to the May Term, A. D. 1931.

CHARLES S. ANDRUS
W. ST. J. WINES
Plaintiff's Attorneys

Springfield, April 23, 1931.

..... do hereby enter ..... security for all costs which may accrue in the above cause.

Dated this ..... day of ..... 19.....

.....

.....

Approved ..... A. D. 19.....

..... *Clerk.*

7 And afterwards to-wit on the 23rd day of April A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Declaration; a copy of said Declaration being in the words and figures as follows to-wit:

8 IN THE CIRCUIT COURT OF SAID COUNTY

To the May Term, A. D. 1931.

State of Illinois,
County of Sangamon. } ss.

John Pokorna,
Plainiff,
vs.
The Wabash Railway Cmopany, a corporation,
Defendant. } Case.

DECLARATION.

John Pokorna, plaintiff, by Charles S. Andrus and W. St. J. Wines, his attorneys, complains of the Wabash Railway Company, a corporation, defendant, of a plea of trespass on the case.

First Count.

For that whereas the plaintiff, on, to-wit, the seventeenth day of August, A. D. 1929, at about the hour of 6 o'clock A. M. was driving a certain automobile truck west along and upon a certain public street in the City of Springfield, County and State aforesaid, known as Edwards street, towards and across another certain public street in said city known as Tenth street which intersected said Edwards street, and the plaintiff was then and there in the exercise of ordinary care and caution for his own safety; and the defendant was then and there possessed of, operating and using a certain locomotive engine with a certain train of cars attached thereto, south, along and upon said Tenth street; and the defendant then and there, by its servants, so carelessly and improperly drove said locomotive and train, that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said automobile which the plaintiff was then and there driving as aforesaid, and thereby the plaintiff was then and there thrown with great force and violence

from and out of the said automobile to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, divers bones of his body were then and there broken, his skull was fractured, his ear drums were ruptured, his eye sight was greatly impaired, and he became sick and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto said injuries so inflicted as aforesaid being permanent, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to, to-wit, Two Thousand dollars, in and about endeavoring to be cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said automobile as aforesaid, at the time and place in that behalf aforesaid, the said automobile, then of the value of One Thousand dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was rendered of no use or value to the plaintiff.

Wherefore, the plaintiff says that he is injured, and has sustained damage to the amount of Fifty Thousand dollars, and therefore he brings his suit, etc.

Second Count.

For that whereas the defendant, on, to-wit, the seventh day of August, A. D. 1929, was possessed of, operating and using a certain railroad extending through the county of Sangamon aforesaid, a portion of the tracks of said railroad running north and south on a certain street in the City of Springfield, county and state aforesaid, commonly known and called South Tenth Street; and the defendant then and there by its servants, drove a certain locomotive engine with a certain train of cars attached thereto, south, along and upon said South Tenth Street to and across another certain public street in said City of Springfield running east and west, and commonly known as East Edwards Street; and the plaintiff avers that at the point where said railroad crosses said intersection of Edwards Street there are four separate railroad tracks used and operated by the defendant; the plaintiff avers

that on the day and date aforesaid at about the hour of
13 six o'clock A. M. he was driving a certain automobile truck then and there owned by him, west; on the north side of said Edwards Street, approaching and intending to cross said railroad tracks on said South Tenth Street, and that he was then and there in the exercise of ordinary care and caution for his own safety; that there was then and there located on the northeast corner of said intersection a large building which was built flush with the sidewalk line on the said Edwards Street and flush with the east side of said South Tenth Street, which obscured the vision of any one approaching said railroad tracks from the east on said East Edwards Street; and plaintiff avers that on the day and date in question and prior to the said hour of six o'clock A. M. the defendant was using and occupying the east track of said railroad tracks as a storage track for the storage of freight cars; that said freight cars so stored on said east track occupied said track both north and south and adjacent to the intersection of said East Edwards Street, that the storage of said freight cars on said track north of said intersection obstructed the view of any one approaching said railroad tracks on said East Edwards Street from the east; that said intersection is located in a thickly populated section of the said City of Springfield, is approximately five blocks south of defendants passenger station, and only a short distance south of the thickly populated business section of said City of Springfield; that on the day and date in question the said crossing was a grade crossing, was not protected by gates, and was not protected by flagman, except between the hours each day of from, to-wit 7:30 A. M. to 5:30 P. M.; that in view of the premises persons traveling west on the said East Edwards Street toward and across said railroad tracks were peculiarly and extraordinarily exposed to danger, all of which facts were then and there well known to the defendant; the plaintiff avers that the defendant, by and through its said servants, had carelessly and negligently placed said freight cars on said east track in close proximity to the said intersection of said East Edwards street, and then and there carelessly and negligently operated its said train south toward and across said intersection, at a high and danger-
10 ous rate of speed, to-wit at a speed of twenty-five miles per hour, whereby and by reason whereof the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said automo-

bile which the plaintiff was then and there driving as aforesaid, and thereby the plaintiff was then and there thrown with great force and violence from and out of the said automobile to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, and divers bones of his body were then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to Two Thousand dollars, in and about endeavoring to be cured of his said wounds, hurts, bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said automobile as aforesaid, at the time and place in that behalf aforesaid, the said automobile then of the value of One Thousand dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was rendered of no use or value to the plaintiff.

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of Fifty Thousand dollars, and therefore he brings his suit, etc.

Third Count.

For that whereas the defendant, on, to-wit, the seventh day of August, A. D. 1929, was possessed of, using and operating a certain railroad extending through the county of Sangamon in the State of Illinois, and passing along and upon a certain public street in the City of Springfield, known as South Tenth Street, and was then and there possessed of, using and operating a certain locomotive engine and
11 passenger train which was then and there driving south and was under the care and management of divers servants of the defendant, approaching a certain east and west public street in the City, County and State aforesaid, known as Edwards Street, both of said public streets and the territory surrounding the intersection of the same, being closely built up and thickly populated section of said city, the said intersection being approximately five blocks south of defendant's passenger station in said city; and the plaintiff avers

that on said day and date and for a long period of time immediately prior thereto, the defendant had not maintained a flagman at said intersection between the hours of 5:30 o'clock P. M. and 7:30 o'clock A. M. following, nor any crossing gates, nor any signal device of any kind to warn persons about to cross said railroad tracks at said intersection, of approaching trains; the plaintiff avers that on the day and date aforesaid and for many years prior thereto, a certain brick building was located on the northeast corner of said intersection, which said building was built flush with the public sidewalk on the north side of said Edwards Street and flush with the street line of said South Tenth Street, thereby obstructing the view to the north of persons driving west on said Edwards Street and approaching said railroad tracks; and plaintiff avers that the defendant was then and there possessed of and using four railroad tracks crossing said intersection, and that at the time and place aforesaid the defendant was using the east track of said four tracks as a storage track for freight cars and had placed said freight cars along said east track approximately to within a few feet of the north line of said Edwards Street, which said freight cars obstructed the view of persons travelling west along said Edwards Street and approaching said railroad tracks from the east; and plaintiff avers that by reason of the premises the persons traveling west on the said East Edwards Street towards said railroad tracks were peculiarly and extraordinarily exposed to danger unless trains approaching said intersection from the north were traveling and operating with especial care and caution and at a low and moderate rate of speed, all of which facts were then and there well known to said defendant; and plaintiff avers that at about the hour of six o'clock A. M. on the day and date aforesaid, he was driving a certain automobile truck then and there owned by him, west, on the north side of said East Edwards Street and was approaching said railroad tracks, and that before crossing or attempting to cross said railroad tracks he stopped his automobile adjacent to said tracks, looked to the north and south and listened for the sound of an engine bell or whistle to ascertain whether any engine of the defendant was approaching said intersection, that he saw no train or engine approaching from either direction and that no bell or whistle on any approaching engine was rung or sounded by the defendant, whereupon he started his said automobile and attempted to cross said track; that just as he drove his

automobile on to one of said railroad tracks he saw an engine and train of cars approaching said intersection from the north at a high and dangerous rate of speed, to-wit, at a speed of twenty-five miles per hour but that it was then too late for him either to stop his car or clear the said track on which the train of the defendant was being operated; and plaintiff avers that in view of the premises heretofore stated, the defendant then and there, by its said servants, with intentional disregard of its duties in that behalf and with a disregard of the consequences to persons lawfully using the intersection of said East Edwards Street and said Tenth Street, and with a willingness to inflict injury upon any such user of said intersection drove the said engine on to and against the said automobile in which plaintiff was then and there riding and the plaintiff was thereby thrown with great force and violence from said automobile on to and upon the public street there, whereby both bones in both of his legs below the knee sustained a compound comminated fracture, he suffered a fracture at the base of his skull extending upwards toward both of his ears, he sustained a rupture of both ear drums, numerous wounds, cuts and lacerations about the body and other injuries, among them being serious and permanent injury to his eyes which has greatly diminished his ability to see; and plaintiff avers that as a result of the said injuries so received by him as aforesaid he has been permanently injured in the respects charged, his health has been
14 greatly impaired, and his earning capacity has been greatly and permanently reduced; and the plaintiff avers that the said truck in which he was then and there riding was then and there and thereby totally destroyed and demolished, the damage to said truck amounting to, to-wit, the sum of One Thousand Dollars; and the plaintiff avers that as a result of said injuries he was confined to a hospital for a long period of time and incurred a hospital bill for care and attention amounting to, to-wit, the sum of Six Hundred dollars and incurred a pyhsician's bill of, to-wit, Eight Hundred dollars and has incurred other expenses amounting to, to-wit, the sum of Two Hundred dollars for medicine, crutches, etc., in endeavoring to be healed and cured of his said injuries; and plaintiff avers that as a result of said injuries he has experienced and endured great pain and suffering, and will continue so to suffer in the future; and the plaintiff avers that the defendant and its said servants then and there controlling and managing said locomotive engine and train, were

conscious of their conduct in the respects charged to have been improper and that their conduct in question would naturally probably result in injury to persons crossing said railroad tracks at said intersection, wherefore plaintiff avers that the injuries then and there inflicted upon him, were then and there willfully and wantonly inflicted.

Wherefore the plaintiff says that he is injured and has sustained damage to the amount of Fifty Thousand Dollars and therefore he brings his suit, etc.

CHARLES S. ANDRUS
W. ST. J. WINES
Attorneys for Plaintiff

Filed Apr. 23, 1931 R. G. Moore, Clerk

Filed May 12, 1931 S. T. Burnett, Clerk

15 And afterwards to-wit on the 23rd day of April, A. D. 1931, there was issued out of the office of the Clerk of the Sangamon County Circuit Court, a certain Summons; a copy of said Summons, together with the endorsements of the Sheriff thereon, being in the words and figures as follows, to-wit:

State of Illinois, } ss.
Sangamon County. }

The People of the State of Illinois to the Sheriff of Sangamon County—Greeting:

We Command You To Summon The Wabash Railway Company, a corporation if to be found in your County, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof, to be holden at the Court House in the City of Springfield, on the first Monday in the Month of May, A. D. 1931, to answer unto John Pokora, in an action of Case, Damages $50,000.00, and hereof make due return to our said Court as the law directs.

Witness, R. G. Moore, Clerk of said Court, and the Judicial Seal thereof, at Springfield, this 23rd day of April, A. D. 1931

R. G. MOORE,
Clerk

(Official Seal)

On the reverse side: John Pokora vs. Wabash Railway Company, Summons, to May Term, A. D. 1931, Filed Apr. 28, 1931, R. G. Moore, Clerk. Charles S. Andrus, W. St. J. Wines, Plaintiff's attorney $1.40 by Andrus.

State of Illinois, } ss.
Sangamon County. }

I have served the within writ on the within named The Wabash Railway Company, a corporation, by reading the within R. W. McElroy, Chief Clerk of said Wabash Railway Company, a corporation, and at the same time delivering to the said R. W. McElroy a true copy of the within writ, this 23rd day of April, A. D. 1931, The President of The Wabash Railway Company, a corporation, not found in my county.

S. T. METCALF,
Sheriff

16 And afterwards to-wit on the 4th day of May, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Notice For Removal; a copy of said Notice, together with acknowledgment of service thereon being in the words and figures as follows to-wit: Notice of Removal

17 IN THE CIRCUIT COURT OF SAID COUNTY,

To the May Term, A. D. 1931.

State of Illinois, } ss.
County of Sangamon. }

John Pokora, *Plaintiff,*
vs.
The Wabash Railway Company, a corporation, *Defendant.* } Case.

To Charles S. Andrus, Esq., and W. St. John Wines, Esq., Attorneys for Plaintiff:—

Please Take Notice That the Defendant will on the 4th day of May, A. D. 1931, at 9:00 o'clock a. m., or as soon thereafter as counsel can be heard, move the Court for an Order

removing said cause to the District Court of the United States, for the Southern District of Illinois, Southern Division, in accordance with the petition and Bond of the Defendant, copies of which are hereto attached.

Dated this 30th day of April, A. D. 1931.

ALLEN AND CONVERSE
Attorneys for Defendant

Received a copy of the foregoing Notice, together with a copy of the Petition and Bond, referred to therein, this 30th day of April, 1931.

CHARLES S. ANDRUS
Attorneys for Plaintiff

Filed May 4, 1931 R. G. Moore, Clerk

18 And afterwards to-wit on the 4th day of May, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Petition and Bond for Removal to the United States District Court Southern District Southern Division; a copy of said Petition and Bond for removal being in the words and figures as follows to-wit:

19 IN THE CIRCUIT COURT

May Term, A. D. 1931.

State of Illinois, } ss.
County of Sangamon. }

John Pokora, *Plaintiff,*
vs.
Wabash Railway Company, A corporation, *Defendant.*

Petition for the removal of the above-entitled cause to the United States District Court, For the Southern District of Illinois Southern Division:

To the Honorable, the Presiding Judge of the Circuit Court of Sangamon County, State of Illinois:

Your petitioner respectfully shows that it is defendant in the above entitled cause, and that the matter and amount in

dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

Your petitioner further shows that said suit is of a civil nature, of which the District Courts of the United States have original jurisdiction, and is a controversy wholly between citizens of different states, to-wit: between the said plaintiff, who was at the time of the commencement of said suit, and still is, a citizen, inhabitant and resident of the State of Illinois and this petitioner, which was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the State of Indiana, and a citizen and resident of said State of Indiana, and a non-resident of the State of Illinois.

That this cause was filed in this Court on the 23rd day of April, 1931, and that the time to plead, answer or demur to the same has not expired under the laws of this state, or the rules of this Court in such cases made and provided.

That said controversy is of the following nature, to-wit: a civil action for damages to person and property by reason of a collision between plaintiff and a locomotive of the defendant at a grade crossing in the City of Springfield, County of Sangamon and State of Illinois.

That the question is as to the liability of the petitioner for said damages to the person and property of plaintiff, and the plaintiff and your petitioner are actually interested in said controversy.

Your petitioner offers herewith a bond with good and sufficient surety, for its entering in said District Court of the United States, within the time as required by law, a copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

The Petitioner Therefore Prays This Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said District Court of the United States, in and for the Southern District of Illinois; Southern Division.

WABASH RAILWAY COMPANY
Petitioner

By ALLEN AND CONVERSE
Attorneys for Petitioner.

State of Illinois, } ss.
County of Sangamon. }

HENRY A. CONVERSE, being duly sworn, states that he is one of the attorneys for the petitioner in the above entitled cause; that he is duly authorized to make this affidavit on its behalf; that he has read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as he verily believes.

HENRY A. CONVERSE

Subscribed in my presence, and sworn to before me this 30th day of April, A. D. 1931, and I certify that I am authorized to administer oaths, and that my commission expires Sept. 4, 1934.

L. S.

L. M. IRVING,
Notary Public.

21 Removal Bond.

Know All Men By These Presents, That we, Wabash Railway Company, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto John Pokora, in the penal sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors, representatives, heirs and assigns, jointly and severally, firmly by these presents.

Yet Upon These Conditions: The said Wabash Railway Company having petitioned the Circuit Court of Sangamon County, State of Illinois, for the removal of a certain cause therein pending, wherein John Pokora is plaintiff and the said Wabash Railway Company is defendant, to the District Court of the United States, in and for the Southern District of Illinois, Southern Division:

Now, if the said Wabash Railway Company, the petitioner, shall enter in the said District Court of the United States, within 30 days from filing of said petition for removal, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 29th day of April, A. D. 1921.

WABASH RAILWAY COMPANY
By N. S. BROWN,
Vice-President.

Attest:
W. D. BENDER
Assistant Secretary

AMERICAN SURETY COMPANY OF NEW YORK
By W. C. KIKENDALL,
(Seal) *Res. Vice Pres.*

Attest:
R. W. TROXELL,
Res. Asst. Secy

State of }
County of } ss.

I, of said County and State, and surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the said County, and State of and a Property Holder Therein: That I am worth the sum of Dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution, and that I have property in the said County of and State of liable to execution, of the value of more than One Thousand Dollars.

Subscribed and Sworn to before me this day of A. D. 192

Notary Public

My commission expires

State of Illinois }
County of Sangamon } ss.

I, Beulah E. Lindsay, a Notary Public of Sangamon County in the State of Illinois, do hereby certify that W. C. Kikendall, Resident Vice-President and R. W. Troxell, Resident Assistant Secretary of American Surety Company of New York, personally known to me to be the same per-

sons whose names are subscribed to the foregoing instrument and personally known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of said American Surety Company of New York, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act as such Resident Vice President and Resident Assistant Secretary respectively, and as the free and voluntary act of said American Surety Company of New York, for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Springfield, on this 29 day of April, A. D. 1931.

BEULAH E. LINSAY,
Notary Public

My license expires May 4, 1934.

23 Form G 362 7-30 (Incorporated April 14, 1884)

AMERICAN SURETY COMPANY OF NEW YORK
General Offices, 100 Broadway
FINANCIAL STATEMENT, JUNE 30, 1930

RESOURCES

Real Estate:			
Home Office Premises, unencumbered, less depreciation		$ 8,356,069.17	
Securities at Market Value:			
Bonds	$ 6,068,660.01		
*Stocks	10,621,923.33	16,690,583.34	
Premiums in Course of Collection		2,905,783.82	
Cash in Banks and Offices		2,233,802.88	
Reinsurance and other Accounts Receivable		229,320.34	
Accrued Interest and Rents Receivable		92,280.16	$30,510,839.72

*At market values with exception of stocks of subsidiary companies, which are carried at par or cost being in each instance less than book value.

LIABILITIES

Capital Stock		$ 7,500,000.00	
Surplus and Undivided Profits	$ 7,855,770.61		
Voluntary Special Reserve	1,250,000.00	9,105,770.61	
Reserve for Unearned Premiums		7,161,405.35	
Reserve for Contingent Claims		4,438,713.91	
Reserve for Outstanding Premiums		700,000.00	
Reserve for Expenses and Taxes		1,282,476.87	
Reinsurance and Other Accounts Payable		322,472.92	$30,510,839.72

TROXELL, KIKENDALL & CO.
General Insurance Agency
Springfield, Ill.

24 Filed May 4, 1931 R. G. Moore, Clerk.

State of New York }
County of New York } ss.:

G. W. THOMAS being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

G. W. THOMAS

Subscribed and sworn before me this 6 day of September, 1930.

B. L. REHBERGER
B. L. REHBERGER
Notary Public, Kings County
Certificate filed in all Counties
Kings Co. Clerk's No. 399, Reg. No. 1041
Bronx Co. Clerk's No. 19, Reg. No. 3171
New York Co. Clerk's No. 79, Reg. No. 1-R-91
My Commission Expires Mar. 30, 1931.

25 American Surety Company of New York

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 15, 1929, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,
American Surety Company of New York.

Gentlemen:

"The Nominating Committee appointed by the Executive Committee of this Company at its meeting held Tuesday, November 13, 1928, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, begs leave to report as follows:

"We nominate for * * * * *

Place	Resident Vice Presidents	Resident Assistant Secretaries
Springfield, Ill.	James A. Easley	H. L. Child
	E. S. Hodges	Arthur M. Fitzgerald
	J. H. Holbrook	Logan Hay
	Edward D. Keys	W. C. Kikendall
	W. C. Kikendall	Alvin E. Skoog
	Albert H. Rankin	R. Allen Stephens
	Latham T. Souther	Cecil L. Thomas
	R. W. Troxell	R. W. Troxell
	W. Staley Troxell	W. Staley Troxell

Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot, on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee, for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the President, the Vice Presidents and the Resident Vice Presidents be, and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver any and all surety bonds and undertakings for or on behalf of this Company, in its business and in accordance with its Charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of the Sec-
26 retary, an Assistant Secretary, or a resident assistant Secretary of this Company."

State of New York, }
County of New York, } ss.:

I, G. W. Thomas, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 29th day of April, 1931.

G. W. Thomas
Assistant Secretary

Endorsed: Filed May 4, 1931 R. G. Moore, Clerk.

27 And Afterwards To-wit on the 4th day of May, A. D. 1931, the same being one of the term days of the May Term, A. D. 1931, of the Sangamon County Circuit Court, the following proceedings were had and entered of record to-wit: Removal Or

John Pokora *Plaintiff*
vs.
The Wabash Railway Company, a corporation *Defendant* } Case

This day comes the defendant by its attorney and presents its petition, notice and bond for removal of this cause to the United States District Court for the Southern Division and the Court having heard the said petition and being fully advised, grants the prayer of the said petition, approves the bond and grants and approves an order removing this cause to the United States District Court, a copy of said order being as follows, to-wit:

28 State of Illinois
County of Sangamon } ss.

IN THE CIRCUIT COURT OF SAID COUNTY

To the May Term, A. D. 1931.

John Pokora,
Plaintiff
vs.
The Wabash Railway Company,
a Corporation,
Defendant
} Case

This Cause coming on for hearing upon Petition and Bond of the Defendant herein, for an Order transferring this cause to the United States District Court for the Southern District of Illinois, Southern Division and it appearing to the Court that the Defendant, has filed its Petition for such removal in due form of law, and that the Defendant has filed its Bond duly conditioned with good and sufficient surety as provided by law, and that the Defendant has given Plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court:—

Now, Therefore, Said Petition and Bond Are Hereby Accepted and It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of Illinois, Southern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open Court this 4th day of May, A. D. 1931.

CHAS. G. BRIGGLE
Judge

29 State of Illinois
Sangamon County } ss.

I, R. G. Moore, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete Transcript of the record and proceedings now remaining in my office, in a

certain cause in said Court on the Law side thereof, wherein John Pokora is Plaintiff and The Wabash Railway Company, is Defendant, a corporation as the same appears from the records and files of said Court in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 11th day of May, A. D. 1931.

R. G. MOORE,
Clerk

L S

Endorsed: Filed May 12, 1931 S. T. Burnett, Clerk

30 And afterwards, to wit: on the 28th day of May, A. D. 1931, there was filed in the office of the clerk of said court, certain pleas on behalf of the defendant in said case, which said pleas are in the words and figures, following, to wit: Filed May 28,

31 IN THE UNITED STATES DISTRICT COURT

Southern District of Illinois.

John Pokora, *Plaintiff*
vs.
The Wabash Railway Company, a corporation, *Defendant* } Gen. No. 18189

PLEA TO DECLARATION.

General Issue.

And the defendant by Allen & Converse its attorneys comes and defends the wrong and injury when etc., and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them in manner and form as the plaintiff has above thereof complained against the defendant; and of this the defendant puts itself upon the country, etc.

First Special Plea to Declaration.

And for a further plea to each and every count of the plaintiff's declaration the defendant says actio non because it

says that the injury and damage to the plaintiff and the automobile operated by him was the result of the negligence of the plaintiff and this it is ready to verify, wherefore, etc.

Second Special Plea to First and Second Counts of the Declaration.

And for a further plea to the First and Second Counts of the declaration the defendant says actio non because it says that the damage and injury to the plaintiff and the automobile operated by him was the result of the contributory negligence of the plaintiff and this the defendant is ready to verify, wherefore, etc.

Third Special Plea to the Third Count of the Declaration.

And for a further plea to the Third Count of the Declaration the defendant says actio non because it says that
32 the plaintiff wilfully and with reckless and conscious disregard of his own safety and of the automobile operated by him and of the safety of passengers and employees upon trains of defendant which he knew might be approaching upon the tracks of defendant at the said crossing in the Declaration mentioned, approached and went upon said crossing without stopping, looking or listening for an approaching train at a place where he could see and hear an approaching train and without exercising any reasonable precaution to discover the approach of a train upon said tracks; and that the conduct of plaintiff in so approaching said crossing was willful and wanton and contributed to the injuries and damages complained of by the plaintiff; and this the defendant is ready to verify, wherefore, etc.

Fourth Special Plea to Declaration.

And for a further plea to that portion of each count of said Declaration, charging the defendant with liability for the damage to the automobile in question, defendant says actio non because it says that the plaintiff did not then and there own and lawfully possess said automobile as his own individual property nor did he then and there have any right, title or interest in and to said automobile; and this the defendant is ready to verify; wherefore, etc.

ALLEN AND CONVERSE
Attorneys for Defendant

Endorsed: Filed May 28, 1931 S. T. Burnett, Clerk

33 And afterwards, to wit: on the 15th day of September, A. D. 1931, there was filed in the office of the clerk of said court, plaintiff's replication to defendant's first plea (general issue) and a demurrer to defendants first, second and third special pleas, and replication to defendant's fourth special plea, which said replications and demurrers are in the words and figures, following, to wit: Filed Sept. 17, 1

34 (Caption)

REPLICATIONS AND DEMURRERS TO PLEAS.

Replication to the Plea of the General Issue.

And the plaintiff, as to the plea of the general issue heretofore pleaded by the defendant, whereof it puts itself upon the country, doth the like.

Demurrer to First Special Plea.

And the plaintiff, as to the first special plea of the defendant by it above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action; and that he is not bound by law to answer the same; and this he is ready to verify; wherefore, for want of sufficient plea in this behalf the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

And the plaintiff demurs specially to the said first special plea of the defendant and as cause for said special demurrer shows to the court here that said plea purports to alleged contributory negligence on the part of the plaintiff as to all three counts in the said declaration of the plaintiff contained, whereas as matter of law, contributory negligence on the part of the plaintiff is not a defense to a charge of willful and wanton injury inflicted upon the plaintiff by the defendant as alleged in the third count of said declaration, and that
35 he is not bound by law to answer the same; and this he is ready to verify, etc.

Replication to Second Special Plea.

And the plaintiff, as to the second special plea of the defendant by it above pleaded, says that he, plaintiff, ought not by reason of anything in that plea alleged, to be barred from having his aforesaid action, because he says that the damage and injury to the plaintiff and the said automobile then and there operated by him was not the result of contributory negligence on the part of the plaintiff, and that this he puts himself upon the country, etc.

Demurrer to the Third Special Plea.

And the plaintiff, as to the third special plea of the defendant by it above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action; and that he is not bound by law to answer the same; and that the is ready to verify; wherefore, for want of sufficient plea in this behalf, the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

And the plaintiff demurs specially to the third special plea of the defendant and as cause for said special demurrer undertakes to show to the court that willful and wanton conduct on the part of the plaintiff contributed to the injuries and damage complained of by the plaintiff as a defense to willful and wanton conduct of the defendant alleged against it as set forth in the third count of the plaintiff's declaration; and the plaintiff shows to the court here that the said allegations in the third special plea contained do not, in law, constitute a defense to the charges set forth in the third count of said declaration, and that the plaintiff is not bound by law to answer the same; and this he is ready to verify, etc.

Replication to Fourth Special Plea.

And the plaintiff as to the fourth special plea of the defendant, says that he, plaintiff, ought not by reason of anything in that plea alleged, be barred from having his aforesaid action, because he says that the plaintiff did then and there own and lawfully possess said automobile as his
36 own individual property and did then and there have

right, title and interest in and to said automobile; and of this the plaintiff puts himself upon the country, etc.

C. S. ANDRUS
Attorney for Plantiff

W. ST. J. WINES
Attorney for Plaintiff

Filed September 15, 1931 S. T. Burnett, Clerk.

37 And afterwards, to wit: on the 16th day of October, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered Oct. 16

* * * (Caption) * *

Friday, October 16, 1931.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

This cause coming on this day to be heard upon the demurrer of the plaintiff to certain pleas of the defendant and upon the motion of the defendant to carry tht said demurrer to said pleas back to the third count of the declaration herein, and the court having heard the arguments of counsel thereon and not being fully advised in the premises takes the matter under advisement.

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38 And afterwards, to wit: on the 27th day of January, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered Jan. 27

* * * (Caption) * *

Wednesday, January 27, 1932.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

This cause coming on further to be heard and the court having heard the arguments of counsel, it is ordered that the motion of defendant to carry demurrer to plea back to the

third count of the declaration and sustain the same, be, and is hereby denied. It is further ordered by the court that the demurrer of plaintiff to the first special plea of defendant be and is hereby overruled and that the demurrer to the third special plea of defendant be, and is hereby sustained.

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39 And afterwards, to wit: on the 22nd day of June, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

22, 1932.

* * * (Caption) * * *

Wednesday, June 22, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas G. Briggle, Judges.

Comes now the plaintiff, by W. St. John Wines, Esq., his attorney, and comes also the defendant, by Allen and Converse, its attorneys, and issue now being joined, the following named jurors are tendered and accepted, to-wit: S. J. Dorsey, Clive Erisman, Paul Gabble, J. R. King, Lord Merriell, Paul Aufdenkamp, H. A. McLean, Leo Humphrey, Mark Smith, R. C. McAtee, Wilson Mills, H. Bice, who are duly sworn to well and truly try the issues in this case and true verdict render according to the law and the evidence. And after hearing part of the evidence in the case, the hour for adjournment having arrived, the further trial hereof is continued until 10 o'clock A. M. tomorrow.

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40 And afterwards, to wit; on the 23rd day of June, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Thursday, June 23, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas. G. Briggle, Judges.

Come again the parties to the above-entitled case, and offer the balance of the evidence, for plaintiff, herein; whereupon the defendant by its attorneys enters a motion for a peremptory instruction to find the defendant not guilty; and after hearing the arguments of counsel, it is ordered by the court that said motion be and it is allowed, and the jury is instructed by the court to find the defendant not guilty, and the verdict of the jury is so entered:

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41 And afterwards, to wit: on the 5th day of July, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Tuesday, July 5, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas. G. Briggle, Judges.

On motion of the plaintiff by W. St. J. Wines, his attorney it is ordered by the court that said plaintiff have thirty (30) days to file bill of exceptions in the above-entitled case.

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42 And afterwards, to wit: on the 1st day of August, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Monday, August 1, 1932.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

Present, the Honorable Charles G. Briggle, Judge.

This cause coming on this day to be heard upon the motion for judgment on the verdict herein and the court having heard and duly considered the same, it is ordered that said motion be, and is hereby allowed. Judgment on the verdict, against the plaintiff and in favor of the defendant and for costs.

It is therefore considered and adjudged by the court that the said defendant do have and recover of and from the said plaintiff, its costs and charges by it about its defense in that behalf expended and that execution issue therefor.

Upon motion of the plaintiff by his attorney, it is ordered by the court that said plaintiff have thirty days in which to prepare and file his bill of exceptions herein.

43 And afterwards, to wit: on the 29th day of August A. D. 1932, there was filed in the office of the clerk of said court, a certain Original Bill of Exceptions (Narrative Form), which said Original Bill of Exceptions (Narrative Form) is in the words and figures, following, to wit:

44 (Caption)

ABSTRACT OF BILL OF EXCEPTIONS.

Appearances:

W. St. John Wines, Esq., Springfield, Illinois, Appearing for the Plaintiff,

Henry A. Converse, Esq., Springfield, Illinois,

Walter M. Allen, Esq., Springfield, Illinois, Appearing for the Defendant.

Filed Aug 29 1932, S. T. Burnett, Clerk.

45 WADE SEELEY:

2 My name is Wade Seeley, I have been a civil engi-
3 neer and surveyor continuously for 27 years, and was formerly engineer for the city of Springfield. Yesterday I made a plat of the intersection of Tenth & Edwards Streets in this city. The buildings there represented are correctly located and the measurements indicated are true and correct. Plat introduced in evidence without objection.

4 On request of counsel for plaintiff the witness exhibits the plat to the jury.

5 Plaintiff's exhibit No. 1, being the plat just mentioned.

JOHN POKORA:

6 John Pokora, plaintiff, 51 years old, born in German, lived in this country 30 years, and groceryman at 2214
7 East South Grand Aveuue. That was my business on August 17, 1929. I have a ice house about 20 feet from the grocery store and sell ice to the public, two or three loads a day, nine blocks to a load.

8 On August 17th, I left home in the morning at 15 minutes to six, driving my Federal truck which I had owned for two years. I was at the ice house at Tenth & Ed-
9 wards five minutes to six and there were a good many trucks there and I thought I would go across the railroad where there is another ice house. I was stopped there, and I cannot stop about forty minutes, and I can not hear no whistle blew, no heard no bell ring, no watchman, and the box cars was sat right at the crossing here, the box car on this side was, and I just look and see nothing, and I was high up, you know and could not see nothing, of course everything clear was, and I no even hear any engine coniing, and at that time I can hear pretty good; I could hear good at that time, and I no can hear nothing. So I blow my whistle; I thought the watchman was over there, and nobody answered to me, so I just started the truck and go across the track, and that is as far as I know. I saw nothing and that is
46 all I know; I can not see no engine or nothing; I can not see nothing or hear anything; I suppose it go so fast I no hear nothing.

Mr. Converse: I object to his conclusion.

The Court: Sustained.

The Witness: And what hit me, I don't know what hit me even.

10 There were box cars on three tracks there. There are four tracks there. The box cars were on the two first ones and the last one, so far as I can see. (Plat exhibit
11 showed to the witness.) The cars were on the first track and on the second. The cars were within about two feet of the crossing.

Q. What happened to you after the train struck your truck?

12 A. Well, so far I can see, I was dead, I don't know nothing about it. I find myself in St. John's hospital in two weeks. I stayed there five months and twenty-four days. Doctor I. W. Metz, of Springfield, attended me.
13 So far as I can see I can not walk, you know. My legs were mashed up and cut up; about a dozen bones out of this leg, it was and about a dozen out of here; two holes in this leg and two holes in this leg (indicating) not healed up yet.

Mr. Wines asked permission to exhibit the scars to the jury but on objection by Mr. Converse the objection was sustained, to which ruling Mr. Wines duly excepted.

Mr. Wines: Were you hurt any where else besides in the legs?

The Witness: Well, I was; I believe I was torn up
14 every place, my head, I cannot see, I cannot hear; I can hear one half and I can see one half; I was mashed up every where. Before I was struck by the train my hearing was good. Since then it is not very good. Before I was struck my eye sight was good, now I can see just about half way, that is all. Since I got out of the hospital I no can work yet, just drive the truck, like this, I
15 no can work like I use to do. I was laid up about a year and a half before I could drive a truck or car. I no can wait on the trade or anything like that, I cannot stay on my legs too long; I no can see very good so I no can see and do nothing in my business at all; In August it will be three years.

16 I bought the truck from Fred Sharafin, new, for
47 $1500.00. I give eleven or twelve hundred dollars and a Ford truck. After it was struck I had it

moved in my side yard where it is now. It is not fixed
17 at all, it is just a wreck, kindling. As a result of my injuries I have suffered all the time. I got pains right now, all the time, never leave. Pains are in my legs, head, back, and everything.

I stopped my truck about ten or fifteen feet from the crossing, from the first truck.

Cross-Examination by Mr. Converse.

18 I live at 2214 East South Grand Avenue. I have a grocery store and a separate ice building there. I furnish ice out in that territory and it takes about three truck loads of ice a day. I come to town three times a day, sometimes four times, have for nine or ten years.
19 Have gotten my ice at the C. I. P. S. Sometimes my boys go for the ice but I went most of the time. That day was fair week and I was afraid they got so much work to do I left the grocery store to mine woman and I go myself after the ice. Other days during the summer I would go for ice about seven or half past seven o'clock. Sometimes when I see no ice I would go down at six
20 o'clock. I did that for several years. Sometimes I went to the ice house on the east side of the tracks and sometimes to the other one. If they were busy on the east side I would go across to the west side. I did that more than hundreds of times. I have seen that passenger train go through.

21 Q. You have seen the train go through at six o'clock?

A. No, not six o'clock; it was too late at that time; that is the reason I got hit; it was too late.

Q. Oh, it was late that day, was it?

A. It was late. I don't know whether there was a passenger train every day over the Wabash at six o'clock, I no pay any attention to the train or anything; I was just calling for the ice. I had seen that train go
22 through many times on other days. Sometimes it blow whistle and sometimes not. Sometimes I go early and sometimes not. There is a driveway that runs out
48 and around a loading station on the east side of the Wabash, but I didn't go on in, I go to the other one,
23 it was too full. I did not stop at the drive way, I stopped at the crossing. I did not wait to get my ice on the east side because no trucks got out and I don't

24 want to stay all day there. I decided that instead of getting my ice on the east side I wanted to cross the road when I see them no move. I knew there was a railroad track there, I had crossed it lots of times and had crossed
25 it early in the morning before, about six o'clock. Sometimes there was a watchman there and sometimes not, I just pay attention to the watchman; Often I didn't see a watchman, after seven o'clock he was there. I was going along on the north side of Edwards Street, near
26 the north curb and was looking straight west.

Q. Could you have seen a train if one had been coming from the north?

A. No.

Q. Why not?

A. I cannot see nothing; I no can see anything, the building was there and the box cars here, and I cannot see nothing. It was a two or three story brick building on the north side of Edwards Street, close to the street,
27 right on the corner, of the Wabash track. No can see by the building; No can see by the box cars. The side track was loaded. The first track had some cars standing on it. I stopped about ten or fifteen feet before I
28 got to the first track. I stopped the truck, but not the engine.

Q. You didn't get out of your truck, did you?

A. I looked out.

Q. You didn't get out?

A. I just stopped like that and looked.

Q. You stayed right in there?

A. Yes sir.

The truck had a cab on it and I was sitting on the south
29 side of the cab. After I stopped my automobile I listened and heard nothing at all. I looked to the north and to the south, every way, and when I looked to the north I
49 didn't see nothing at all. The building wasn't so bad, the box car was in front of me close to the crossing and shut off my view. That is the reason I cannot see it. I could not look to the north and see anything of a train coming from the north. I stopped about ten or fifteen feet east of the first track and looked,
30 to the north and I could not see any where up the Wabash track at all because the corner of the building and the box car on the first track kept me from seeing up the track. Then I started my car up again. I did

not see the train at all. The next thing I know I was
31 in the hospital. I have never seen the train. I don't know what hit me. All I know about it was what people tell me. I was found over to the south. There wasn't any crossing watchman there. Nobody signaled nothing.
32 Nobody gave me any motion to come on. Nobody was in front of me that day just some people in back of me.
33 I just had that one Federal truck. I owned the truck. I bought the truck myself. I have been living at 2214
34 East South Grand Avenue 28 years in October. I moved there about 20 years ago and before that I lived in the other house just about two houses away. I have lived at 2214 twenty years. My business the last ten years has been groceryman, meat and hay, and in the slaughter
35 house business. I killed and butchered at 2214 and was in the ice business, that is all.

Q. During the last ten years you have not been in any other business except what you have told the jury of?

A. I have been about nine years in the ice business.

Q. Now during the last ten years have you lived continuously at 2214 East South Grand Avenue?

Mr. Wines: I object to that as immaterial. I think perhaps the Court knows what this is leading up to. I think it is entirely immaterial and not cross examination.
36 I would like to speak to the Court privately and with Mr. Converse before anything further is asked.

The Court: All right, we will step into the next room.

Mr. Wines: The purpose of this is to show conviction for selling liquor. You told Pokora the last time you had him that the next time he came up you were going to send him to Leavenworth for two years, and he said,
37 "Judge, I will never be here again." This has all
50 been a long time ago and he has not been bootlegging since long before this accident and I think it is prejudicial to try to show this jury that he was convicted at one time in this Court.

The next five pages contain the informal discussion which took place in the Judge's chambers and at the conclusion of that part of the discussion the Court states, on page 41, "I think I will let you make your offer and sustain the objection."

Mr. Converse: Well then I offer to prove that this plaintiff was found guilty of contempt of court by the
42 District Court in the Southern District upon two occa-

sions and that the plaintiff was found guilty of contempt of court by violating an injunction restraining him from selling intoxicating liquor n volation of the National Pro hibition Act.

43 Mr. Wines: To which I object.
The Court: Objection sustained.
44 The Court: Anything further Mr. Converse?
Mr. Converse: Believe that is all.

45 MIKE USHMAN:

My name is Mike Ushman and I live on Rural Route
46 No. 3, am a coal miner and know John Pokora. I remember when he was hurt on August 17, 1929, at Tenth & Edwards Street in this city. I was driving my car and was right behind Pokora about six o'clock in the morning. Pokora was driving on the north side of the street, as he approached the Wabash tracks. He stopped there
47 right before he got to the track, I would judge around 10 or 15 feet. Then he went ahead. All at once I heard a crash; I heard a crash and that is all I can tell; it happened so quick that I really don't know myself. I stopped my car when he stopped his car. I didn't hear any whistle
48 sounded by the train, or any bell. I could not say how fast the train was going. It run a long ways down there to the south after hitting him. I guess the back end of the last coach was five or six hundred feet south of the Edwards Street crossing. I jumped out of my truck and went to see who it was and recognized him when
51 he was laying there. He was on the east side of the Wabash track. The truck was on the south side of
49 where he was laying. I thought he was dead. I stayed there maybe about 10 minutes. I drove away before the ambulance came. I have seen the truck since. It was all banged up, the engine all broke up, and the body all crushed; it was just junk.

Cross-Examination by Mr. Converse.

I have known Pokora about 25 years, we used to work
50 in the mine together years ago. I do not have much trade with him at his place, just a little. At the time John was
51 struck I was on Edwards Street coming in on 11th Street.

John was in front of me. I followed John west on Edwards Street from 11th Street. I could not say whether John tried to go in the ice house on the north side of Edwards Street. He was looking in there, but I don't know what his intention was. I didn't know it was John
52 ahead of me until after he got hit. His truck had a cab on it and he was sitting on the left hand side. To the best of my recollection he didn't stop at the ice house, but went by slow, looking in there. I was 30 or 35 feet behind him. He went out up toward the track and stopped there, about 15 feet or so, maybe more or less, from the
53 east track and that track had some cars on it. He stopped for about a minute or two. Sure, he stopped. He was ahead of me and I could not go past him. I got within about ten or fifteen feet of him and then he started up and I started up and followed right along behind him.
54 The first I knew there was going to be an accident was when I heard the crash. The train hit John, not John hit the train. I stopped my car, jumped out and ran
55 right over to him and looked at him for four or five minutes. While that was going on I wasn't paying any attention to the train. I really don't know where the train did stop.

Re examination by Mr. Wines.

The Witness: I saw those box cars standing on the two tracks right close to Edwards Street, right close by the sidewalk.

56. *Recross Examination by Mr. Converse.*

I first noticed those cars when I stopped there waiting for him to get away so that I could go across. They
57 52 were right around eight or ten feet from the sidewalk. I didn't look at them again after the accident.

HENRY BUCKHOLDT:

I am 11 years old and at the time John Pokora was
58 hurt, lived on the corner of 11th & Edwards, at the north east corner. My father ran a pie bakery there underneath where we lived. I know John Pokora and saw him

go by my father's place on the morning he was hurt about six o'clock. He was going west on the right side of
59 Edwards Street. I was out in front of our bakery. It was the first day of the State Fair. I was going with the driver that morning and was waiting for him to come. I watched Mr. Pokora as he went west. He went up to Tenth Street where the railroad is. He stopped before starting across the tracks, then he started across and the
60 train hit him. The train was going south. After the train hit him I ran over there as fast as I could. Mr. Pokora was lying by the switch on the east side of the track. I thought he was dead. I didn't stay very long. I just looked at him and ran back home. I did not hear
61 any bell or whistle that morning on the train.

Q. Do you think you could have heard or would have heard it if it had been sounded?

Mr. Converse: We object to that, if the Court please; this boy was a block away.

The Court: Sustained.

(To which ruling of the Court, the plaintiff, by his counsel, then and there duly excepted.)

The Witness: Yes sir.

Mr. Converse: I move that the answer be stricken.

The Court: The answer may be stricken.

(Exception by Counsel for plaintiff.)

Cross-Examination by Mr. Converse.

62 I will be 12 years old on July 30th. The accident hap-
63 pened the first day of the fair three years ago. I saw him in his automobile and knew it was John Pokora. My dad used to make him on the pie route and he would take me along with him sometimes. I have been to Mr. Pokora's store. He was one of my father's customers. I am sure I saw him stop way up there at Tenth Street.
64 53 There was another car right behind him, and they both stopped. I was just looking toward the ice plant and was talking to my aunt and saw the train come along and saw this accident.

HENRY A. BUCKHOLDT, SR.:

I live at 526 South Eleventh and am the father of the boy who was just on the stand. I did not see this accident or any part of it. I have lived there prior to this accident for about ten years. I am familiar with that Wabash train that goes south at about six o'clock in the morning. I can ordinarily hear a whistle when they blow it and if they ring the bell I can hear the bell. I did not hear any bell ringing or a whistle sounded on the morning that something struck Mr. Pokora.

Cross-Examination by Mr. Converse.

I was checking out the drivers that morning. I heard the noise of the train, but I never heard any whistle. I think I heard the train rumbling. At the time I heard the crash I was checking the drivers who were in the store with me. Only one driver was in the store and I was going over his sheet of customers. We were talking at the front door and I was checking up his customers. I did not have a pencil in my hand, I was just looking at the figures on the sheet. I did not know that Pokora was in the neighborhood. He is a customer of mine and had bought pies from me a good many times. After this accident happened John came and asked me about it, about a year after that, that was the first time he talked to me about it.

HENRY ROY:

I live on Rural Route No. 7 up towards Rochester. I know John Pokora, when I see him. At the time that train came along I was just to the east of the drive at the ice house on the east side of the railroad track. The ice house is on the northeast corner of Tenth & Edwards and I was east of the tracks. I saw Pokora's car pass and there were two or three cars ahead of me standing there. I was driving my own car. Pokora's truck was nearest to the railroad tracks ahead of me. The cars were stopped, yes sir, absolutely stopped. When they started up I was going west on Edwards Street myself. I guess he didn't get in the middle of the track

until the crash came. I stopped my car and jumped out. If there was a whistle blown I didn't hear it. I didn't hear a bell ring. I should judge the train stopped maybe
73 100 or 150 feet south of the crossing. It was a passenger train. Pokora's truck was thrown off on the east side of the track and Pokora was lying kind of southeast. I ran up there and if he hadn't been breathing I would say he was dead. I stayed until the ambulance came. I am not that good with mathematics to tell how fast the train was coming, but I know it caused an awful crash.

Mr. Converse: Objection to the answer as not responsive.

The Court: It may be stricken.

74 *Cross Examination by Mr. Converse.*

At that time I was working at 19th & Jefferson in East Springfield. I came along at six o'clock that morning to let my wife out at Mr. Buckholdt's. She was working there during fair week. The first I saw of Pokora that morning he was lying on the ground. I had seen his car ahead of me. There were two cars between my car and his car, I was the third car back. I did not go up to the
75 ice plant at all. I could not say who had the car right ahead of me. I had stopped. I was just driving along and could not run over the other cars. I didn't stop, but I slowed up and when Pokora and them started up the train hit his truck and I left my car standing in the middle of the street and jumped out and ran up to where he
76 was. I was driving a Model "T" ford and when it
77 started up it made the usual noise. It is a pretty noisy car, a poor man's car. I sure saw the train when it hit him. I noticed the train as soon as the conductor came back with pencil and paper in his hand and was taking names. He did not get my name because I ducked. I
78 don't like to be in a trial. Afterwards they laid Pokora on a stretcher and put him in an ambulance and I left.

Q. Now if you "beat" it when the conductor was trying to get some witnesses how do you happen to be here as a witness now if you don't like to come to court?

A. I was subpoenaed. I don't know how I hap-
55 pened to be in this trial or who told them I knowed anything. I never talked to anybody about this case. I did not talk to Pokora. I have talked to nobody. I was

79 subpoenaed on the 22nd by the gentlement with red neck time. He found me at my house. I do not know how he came to be out there to pick me up as a witness.

OTTO GOETZ:

80 I am tank man for the Central Illinois Public Service Company, the ice company at 10th & Edwards Street, and was working there the morning that John Pokora was struck by a train. I had charge of the platform and was loading out the drivers. I did not hear the crash when the train hit Pokora. I could not hear the crash on account of the scoring machine was running and it makes very much noise. My attention was attracted to the fact
81 that Pokora had been hit when the drivers ran out. The drivers called "accident" and I jumped off and went down there. Pokora was lying on the east side of the track, his truck was lying there by the track. I helped pick Pokora up and he was covered with cinders and blood all over him and we took a cushion out of the truck and placed him on it. One fellow called an ambulance and I went back and called his son and then I came back again to the place of the accident to pick up his ice tickets. Pokora was in the habit of getting ice there in the morn-
82 ings. He stopped there at the corner of the engine room to try to get a load of ice on the east side of the railroad track. Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes until all the drivers were loaded out. He wanted to get across the track and get his load of ice at the other plant. I did not notice whether he stopped before he got across the track, but he stopped right at the engine room. I am sure of that and he wanted to back into the platform.

Cross-Examination by Mr. Converse.

I was working at the ice house on the east side of the
83 Wabash. That building is flush with the sidewalk on Edwards Street and is flush with Tenth Street. The
56 place where they come in to load ice is around fifty
84 feet from the corner of the building I imagine. (The plat shown to the witness by Mr. Converse, who called at

tention to the platform, alley and other matters shown on the plat.) The wholesale platform where I was standing is about forty feet north of the sidewalk and on the east side of the U. P. S. ice plant. This is where I stopped Pokora. The trucks were lined up so that I could not let him in at that time. I told him he would have to wait about twenty minutes and he wanted to know if he could get his ice quicker across the street. He didn't say he was in a hurry but asked if he could get it quicker over there than wait here so long and I told him that I thought he had better than to wait by the time we got all of the trucks loaded. I told him I believed he could get his ice quicker across the street. He left and drove out on Edwards Street going west. I don't know if there was anybody behind him. The whole platform around there was parked with trucks; I could not see that. He disappeared from my sight and I went back to my business.

There was a great deal of noise around there. The old type scoring machine is what made so much noise. Sometimes you can't hear yourself talk. You can hear that scoring machine pretty well. There are eight saws on that scoring machine and when that machine is running you cannot hear nothing then, especially when you stand right close to it. I would say the noise from those saws could be heard a block away. A kind of a singing noise. I didn't hear the crash at all. The scoring machine at that time was inside of the building, now it is outside. Sometimes I would leave the doors open when I come out to make the charge tickets for the drivers. The scoring machines are working when the people are up there loading, because they have to keep cutting off chunks of ice for them. It was a busy morning. That is the reason I told John he could get a load quicker on the other side. John had been in the habit of coming to the platform for ice and he frequently came around six o'clock in the morning. When he is out of ice at home he comes about six o'clock. He has to get ice as quick as he can and get his ice house filled up.

93 57 DOCTOR IRVING METZ:

I have been a physician for thirty years, practicing in Springfield. I was called to attend John Pokora for in-
94 juries received by him August 17, 1929. I first saw him at St. John's hospital around 6:30 o'clock. He had a
fracture at the base of the skull, extending back along
58 the parietal margin and in to the occipital region, which is the back. He had a comminuted fracture of the right leg at the junction of the upper and middle third; a compound comminuted fracture of the left leg at the juncture of the lower and the middle third; he had a rupture of the ear drum, and numerous bruises and abrasions over the body. We immobilized the fractures, gave them emergency treatment; we placed him in bed with the head elevated; we applied ice to the head to check the hemorrhage from the ears, and gave him opiates to keep him quiet. I cannot say how long I treated him at the
95 hospital as I did not bring my memorandum. The hospital has the records, but they don't like to have us take them away. I saw him practically every day; at first, several times a day. After he was removed to his home he came to my office. I think at first he came every other day and then he came less frequently so that I should say once a week, and then every two or three weeks.

96 X-Ray pictures were taken at the hospital and I have them with me. (Witness produces X-Ray films). These (indicating) are the first pictures of the legs that were taken before any reduction was made. Exhibit No. 2 shows the condition of the bones before I set them. Ex-
97 hibit No. 3 is a view after the plates were inserted, a front view. (The films offered in evidence after submission to opposing counsel. The Doctor then exhibited the films to the jury, holding them before the light and explained them.) The witness continued:

This picture shows a shattering of the bones in the right leg. This (indicating) is the left leg, showing the displacements, some overriding of the parts, and the fracture of the smaller bone again, the fibula.

(The Doctor then showed the jury Exhibit No. 3 and 4 and explained them.) Exhibit No. 4 was taken after we
98 used the steel plates, called Lanes plates. These (indicating) are on the right leg, the steel plate after you put

the screws in each end. That (indicating) is a picture of the fragments of the left leg, and we have that here. We ignore this little bone, the fibula, because it takes care of itself, and we don't have to be so careful about that. Exhibit No. 5 was taken probably six weeks
59 after the plate was inserted, to show the change that had taken place with the pressure of the plate that is exerted on the fragments. Then six or seven weeks later that is the appearance of the leg. You will see the difference. Exhibit No. 4 shows the left leg when the
99 plate was inserted.

The Court: You mean the picture in your left hand?

The Witness: In my right hand. The one in my right hand is Exhibit No. 4 when the plate was inserted and the one in my left hand is six weeks later.

Mr. Wines: Now Doctor have you the pictures of the fracture of the skull and if so will you produce them?

(Witness produces X-ray films.)

The Witness: There again we take a front and a lateral view. These pictures were taken by Doctor Bain,
100 the Pathologist at the laboratory. He has been connected with St. John's Hospital as X-Ray Pathologist for ten or fifteen years to my personal knowledge; before that he was the bacteriologist for the State. The pictures of the legs have been in my possession since they were taken. I use them to keep in touch with the case. Exhibit No. 7 is an anterior-posterior view showing the fracture over the base extending up the back through the parietal region in the direction of the occipital. Exhibit No. 8 is
101 the lateral view, showing the line of cleavage of the fracture along there. Pokora's ear drums were ruptured. (X-ray pictures admitted in evidence without objection.)
102 The witness then identified the bill from St. John's hospital, total $617.99 for services rendered to Pokora, as the usual and customary charges for like services. (Same admitted without objection.)

The Witness (Continues): My bill against Pokora for treatment furnished by me to him as a result of his injury is $800.00 and is the usual, ordinary, reasonable and customary charge for like service. The injuries received by Pokora would be painful.

Q. Have you any idea personally how much pain and suffering such injuries would cause. Is there any way you can tell the jury?

Mr. Converse: I object to that; I think that is going beyond the realm of proper examination.

Mr. Wines: I don't know whether he can or not; if he can not, he can say so.

The Court: The patient can tell that, not the Doctor. (Exception to the ruling by counsel for plaintiff).

The Witness (Continuing): I examined his legs last Saturday. They are healed, with the exception of a small opening in each leg, which exudes serum; and he tells me that about a week ago what we call a spiculum of bone came out of the leg, which sounds reasonable. Otherwise they probably would have been healed quite some time ago. A spiculum of bone is just a little sliver that is thrown off in cases of this kind. You understand, the bones were shattered, and practically none of those pieces were removed from the locus: the legs were plated with the fragments in sito.

Cross-Examination by Mr. Converse.

I was called immediately after the accident and have continued as Pokora's Doctor and surgeon ever since. I treated him for his legs, head and all of the different things. The spicula that come out are little slivers of bones and are not necessarily serious. I think Pokora has made a pretty good recovery. His right leg has practically recovered, but not 100% because there is still a fissure there, but I am satisfied that that will close up. I don't know how much he is lacking in his left leg.

Q. How much is he short of a full use Doctor?

A. I would say anywhere from sixty to seventy per cent.

Q. He has probably disability at the present time somewhere between thirty and forty per cent in his left leg?

A. Yes sir. My best judgment is that this disability will continue, but I cannot say definitely because I don't know how much injury has been done to the nerves controlling the muscles of the leg. Time will have to tell the story. The fractures in his skull have completely healed so that he has a god normal head right now, so far as the bony structure is concerned.

Redirect Examination by Mr. Wines.

61 If he is injured in walking I would attribute it largely to muscle weakness, due to the injury to the nerves, and atrophy of the muscles as a result of the nerve injury. "Atrophy" means shrinkage or deadening; it grows weaker and weaker and finally becomes useless.

108 DOCTOR ARTHUR E. WALTERS:

I am practicing eye, ear, nose and throat, in the Prince Sanitarium, and am a gradute of St. Louis University in 1905. I am occupying and maintaining the institution that was formerly occupied by Doctor Prince on Capitol Avenue and have succeeded to that business.

109 I examined John Pokora this morning at your request. He has a rupture of the left ear drum at the lower quadrant; he also has a rupture of the right ear drum at the upper anterior quadrant. I tested him out on his hearing. He could hear a watch tick on contact, that is against the ear. Normally he should be able to hear a watch tick at from twenty four to thirty inches. Both ears are affected.

(No cross-examination).

110 FRED C. SHARAFIN:

I sold a new Federal motor truck to John Pokora for about $1500.00. I saw it and examined it after it was struck by the Wabash train. It was beyond repairs; it could not have been repaired.

(No cross-examination).

111 JAMES B. YATES:

I have been an auto mechanic for five years. I saw the Federal truck belonging to John Pokora after it was struck by the Wabash train. The motor was busted, the frame was sprung, the cab was torn off, the radiator was ruined and the body was demolished. It was just a wreck, that was all. It was beyond repairs.

Cross-Examination by Mr. Converse.

I first saw it about two years ago. I was buying and junking automobiles and saw it in his back yard. I have traded with Pokora some for the last two months.

ROLAND BURRIS:

On the day that Pokora was injured at the corner of Tenth & Edwards Streets, I was living at 921 or 923, I forget which it is, anyhow, it is right across from the ice plant. On the north side of Edwards Street and west of the ice plant. There was a vacant lot between the house I lived in and the Wabash tracks. My house faced south. I was in the house at the time the train struck. My wife was on the front porch. I heard the brakes squeak on the train and my wife came running back in and said they had a wreck. I put on my shoes and walked over there.

Q. Did you hear the collision between the train and the truck?

A. Well, I didn't pay much attention to that.

Q. Did you hear any whistle or bell sounded by that train?

A. No, I didn't. Pokora was lying on the cushion when I seen him. The truck was lying a little south of him. The Wabash train was still south of them, the last coach was passed the south side of the sidewalk a little ways. I did not count the number of cars in the train.

Cross-Examination by Mr. Converse.

The house I lived in was about 150 feet west of the Wabash tracks. It was a double house, and I lived in the west side of the double house. I think I was in the kitchen about six o'clock in the morning. It was about breakfast time and my wife had gone out to get the paper. The first thing I knew I heard the squeaking of the brakes and then my wife ran in. I don't remember just what I was doing. I do not ordinarily help get breakfast. I did not have any chores to do. I was working at Abe Barker's Junk Yard. I have known John Pokora

about ten years. Once in a while I would see Pokora at the ice house in the morning. I would leave home before seven o'clock. Once in a while I would see Pokora on the west side of the track. I did not see anything
120 63 of the accident myself. The train was fifty or seventy-five feet south of the crossing. I never paid much attention to it.

Redirect Examination by Mr. Wines.

I noticed freight cars standing on the east track that morning. (Plat shown to the witness.)

Q. Can you show me on this plat how close they were to the corner?

121 A. It was just about along here (indicating).

Q. That is, your finger is about half an inch from this dotted line showing the building line; is that right?

A. Just a little west past the plant.

Recross Examination by Mr. Converse.

I think the freight cars were about six or eight feet from the sidewalk line, but I did not measure.

122 When I came across to where John was he was on the south side and I afterwards went back across Edwards Street to my house. I didn't go over to where those cars were, but when I came out to go to work I came out to Edwards Street and went down to the track and I noticed the car, after the accident. I was studying about the train, where it hit him at, and then looked to see if he could see down the right-of-way before he got up on the main track. I did not go over on Edwards Street sidewalk to take a look to see how far I could look. I
123 did not try to sight it and don't know if a man got on to the side track how far he could see down the main track.

MRS. EVA BURRIS:

I am the wife of Roland Burris, who has just testified.
124 On the morning that Pokora was hurt we lived at 923 East Edwards Street, right across from the ice plant, that is located on the southwest corner. We lived west

of the Wabash tracks and our front porch was on the south side of the house. I did not see the collision between the train and the automobile. My husband built the fire and I went out to get the paper. I reached down
125 and got the paper and stood on the front step and opened it. I noticed a man running across the street, toward the the railroad track and I saw the back end of the passenger train on the track and people running all ways up to the track. I went in and told my husband, but did not go over there. I did not hear any whistle blown or any bell rung on the train that morning. The back end of the train was just beyond the sidewalk on the south side of the cross.

126 I went over afterwards. I looked out of the window first and they were putting that man in the ambulance. There are always box cars sitting on the east side. There was a big box car sitting there because I and my husband stood talking afterwards together about how he got hit and we decided because he could not see—.

Mr. Converse: We object to that.

The Court: Sustained.

(Exception by plaintiff.)

127 The building is almost to the sidewalk and that car was right next to it.

Cross-Examination by Mr. Converse.

On this particular morning I was anxious to see what was in the adds. My husband built the fire, put the tea
128 kettle on and called me. I went out and got the newspaper and sat down on the front step and turned to the want add page. I hadn't got to it yet when I saw a man running. That is the first I knew of any accident. Yes, I heard the noise, but there is always the banging of
129 switching trains and switching cars all hours of the day and night there. I was used to the noise and that is the reason I didn't look up. When I looked up at the railroad train it had just cleared Edwards Street and from where I was sitting on the porch I could see the back end of the train and it was standing still. I ran in the house and told my husband about it.

130 I just heard the train coming and never thought to look up. I knew it went through, it was on time that

day. I could hear the train rumbling down the track as it came from the north towards Edwards Street.

Q. Well now isn't it a fact Mrs. Burris that it
65 might have been ringing a bell and you have been so used to it that you didn't pay any attention to it at all?

A. I was so nervous from hearing those bells all of the time and switching of trains I could always tell when I heard one.

Q. Well, isn't it a fact that you got so used to hear-
131 ing them that you didn't pay any attention to them part of the time?

A. Absolutely no; I have never lived by a railroad before; it was always switching trains and ringing bells all hours of the day and night.

M. R. HODGES:-

I am a salesman for the Springfield Produce Company, which is located on the northeast corner of Tenth
132 & Capitol Avenue, where I have been employed for about eight years. The Wabash passenger station is on Tenth Street between Washington and Jefferson Streets. Washington Street is at the south end of the station, the next street is Adams, the next Monroe, the next Capitol Avenue where I work. The next street south is Jackson and the next is Edwards Street.

133 Along the track going south there is just storage buildings, the Merchants Transfer on Tenth & Monroe, the Wabash Railroad office on the other side on the southwest corner, then we are located at Tenth & Capitol on the northeast corner where we have been for about ten years. The Wabash tracks are four blocks east of the
134 public square. Between the public square and the Wabash tracks seems to be a business section, not residential at all. The C. I. P. S. ice plant is on Tenth & Edwards.

I was at the Springfield Produce Company on the morning that the Wabash train came south and struck Pokora. He has been a customer of mine and I have been calling him for twenty years on the telephone
135 around six o'clock to see if they needed any produce. On this particular morning I called up and his wife answered and said that John got hit with the Wabash. I

called about 6:10 or 6:20, I observed the Wabash train going south that morning. As it passed the Springfield Produce Company I should judge it would be going anywhere from 25 miles an hour to 30 at least, like it was
136 making up time; it was past time. I didn't hear it
66 ring any bell or blow any whistle as it passed. I have got pretty good ears. It passes about twenty-five feet from my chair.

Cross-Examination by Mr. Converse.

I was not busy at my desk telephoning at the time that train went by. I was getting ready to get busy. I got
137 busy on the telephone about ten or fifteen minutes afterwards. I hadn't started using the telephone at that time, not when I heard it go by. My attention was attracted because it was going pretty fast. I figured the train was ten or fifteen minutes late. I didn't look at any clock. I had no reason to do so. I don't know anything about
138 the train stopping down below there at the Wabash shops. From Washington Street to my place of business it is four blocks; he got a pretty good start. It is three blocks. I mean to tell the jury that this train had started at the station and in running three blocks had gotten up a speed of twenty-five or thirty miles an hour. It didn't make any difference to me because it went fast.
139 I just naturally see it and watch it. I was watching out through the door which was wide open. I don't even have to turn my head. In sitting at my desk I face the south. I generally watch the train to see how much traffic is on the train, how much passenger service they have. The door is about three an a half or four feet
140 wide. You can see more than one coach, you can see pretty near the whole thing.

On this particular day I remember right after I got the report that this train went by and I didn't hear any
141 whistle; I know that. I didn't know that John had been hurt until his wife told me on the phone. It must have been at least fifteen minutes afterwards or maybe
142 twenty. She told me he was hit at Tenth & Edwards and I figured it was the Wabash train. That is the only train that could have hit him.

Q. Then you stopped right then and there and began to think how fast the train was going.

A. No, I never stopped and thought anything about it.

67 Q. Well then how do you know about it now.

A. Because I knew about it at that time, but I never thought about it, I knew about it; I did not have to think about it; it was pictured in my mind; there wasn't anything much for me to think about it, about how it was going. I knew it was late. It was the first day of the Fair Week and I knew it was late. I figured about ten or fifteen minutes late, because if it is on time it is 5:50. I have went on that train hundreds of times to
143 Mt. Sterling and Quincy. That is the time I always would be down there, so I would not be late. Very seldom it was on time, many a time I have waited on that train. I have not had any friction with the Wabash. I have been perfectly friendly. I would not say a word against them intentionally or unintentionally. As a rule they hit up pretty fast when they get up there. If the train is on time they didn't go so fast, but if they were a little short it sure looked like he was trying to catch up something.

144 From Washington Street down to Edwards Street there are warehouses, depots and storage house all the way down. Those business houses are built there so they can be on side tracks. We have a side track. I don't know whether it is the same way down at the C. I. P. S. ice house.

CLARENCE STANBERRY;

145. On the morning that John Pokora was hurt at the corner of Tenth & Edwards Street I was working at the C. I. P. S. Company on that corner. I was delivering ice and was driving one of their wagons. At the time Pokora's truck was struck by the train I was loading my ice cubes in the side of my little box. I was right next to Edwards Street. (Plat shown to the witness). At
146 that time we had a grinder that we ground our ice with that stood on this platform of this service station. At that time I was loading ice on the west side of the service station with my horses nearly out on Edwards Street.

My attention was attracted when I heard the train
68 hit Pokora's truck. I did not hear any whistle blown or bell rung. I could have heard it if it had been blown.

147 After the train struck the track I went over there and there were three or four more of us went over at the same time. Pokora was lying on the south side of the sidewalk on Tenth Street just on the east side of the rail road track. His truck was lying about ten feet south of where he was. To my best knowledge, just judging the distance, the rear end of the train was at least one hun-
148 dred feet down the track before it stopped. There are always box cars or freight cars standing on the east track there on the north side of Edwards Street. They were standing there that morning. I would judge the last car toward the sidewalk wasn't over four or five feet back. I didn't personally know Pokora. It was not my business to load his truck. I had no business to load anybody's truck, but my own.

Q. Give to the jury your best judgment as to how fast the train was travelling.

A. Well, I could not make a statement or estimation, but as to how far it was down the track it must have been running—

149 Mr. Converse: We object to that.

The Court: Sustained.

(Exception by counsel for plaintiff.)

Mr. Wines: Have you an opinion as to how fast it was running? Just answer that "yes" or "no"?

A. Yes.

Q. On what do you base that opinion?

A. From the distance it was down the track.

150 *Cross-Examination by Mr. Converse.*

When I was getting my ice cubes I was at the service station. I was out at the edge of the service building and there weren't any buildings between me and the Wabash tracks. If I looked to the northwest the building would
151 hide my view. The train was coming from the north. The train was stopped when I seen it. I was not paying any attention to the train at all until it hit him and after it hit him I jumped up and ran over there. After
152 69 getting there and finding out who it was I commenced looking around to see how far the train had gone down the track. I didn't step it off, I am using my own judgment of the distance. I had no occasion to measure how far those cars were from the north side. There

was not anything that called my particular attention to
53 the cars that were there on that morning. All the time I was there every day the cars were parked four or five feet from the sidewalk in my estimation. I always noticed them.

Mr. Wines: That is all. We rest.

The Court: Evidence closed on behalf of the Plaintiff.

Mr. Converse: We wish the record to show that we offer at this time a motion for peremptory instruction, asking the Court to direct a verdict of the jury finding the defendant not guilty. And we are not merely formal in this; we mean it seriously, because our position is that under the testimony of the plaintiff himself he is absolutely barred from any right of recovery under all of the latest decisions, without any exception, that have been handed down in these cases.

The Court: The jury may retire; you may be excused until ten o'clock tomorrow morning.

54 Mr. Converse: I beg the Court's pardon for talking as much as I did; the Court should have called me down.

(Jury retires.)

The Court: Let the record show that at the close of plaintiff's testimony defendant moves for a peremptory instruction to the jury directing it to find the defendant not guilty.

(Mr. Converse and Mr. Wines argue motion for a directed verdict.)

The Courft I think counsel on both sides of this case are quite familiar with this Court's construction of the opinion of the Supreme Court of the United States in the Goodman case; it has been up here a great many times and the Court has been required to rule under it, that it does not lay down any new rule. It requires a person approaching a railroad crossing to exercise due care for
70 his own safety before he attempts to cross. It is simply another way of discussing the former rules,
55 which were well established as to what the exercise of ordinary care requires a person to do when he goes into a known place of danger. Everybody knows that a railroad crossing, in the country or in the city, or in a densely populated portion of a city is a dangerous place, and the requirement of the rule is not met by merely

stopping, if there be a stop, before going into the place of danger. The law as now interpreted by the Supreme Court of the United States requires a person going into this place of danger to do whatever a reasonably prudent person would do under the same or like circumstances; he is required to use his faculties.

There is no question here but that prior to this accident the plaintiff in this case was a man of vigorous health, with good eyesight, and hearing very good. A person going into a place of danger is required to use his senses, and if he does not use his senses as an ordinarily prudent person would do and he gets hurt, it is simply his fault.

This case is different in many respects from the Conrad case; but it is like the Zayac case in many respects. I felt at liberty in the Zayac case to permit that case to go to the jury. In that case, in the car that was hit there was plaintiff's intersfate and his children, and some neighbor children; it was Sunday morning; they were on their way to St. Louis to see the wife and mother, who
156 was then in the hospital; they came along the highway to a street in the City of Collinsville in a fairly densely populated portion of that city; the driver came to a point probably ten or fifteen feet from the first track where he stopped, and looked, and listened,—according to the testimony of the witnesses. The train was coming from the right: the view was obstructed by trees along the right-of-way and by a line of telephone poles. From the point where the deceased looked, the telegraph poles were more like a picket fence than they were like a string of telephone poles, because he was looking at them just off of the pole line, so that they were almost as a solid body. Then there were the trees. He was driv-
71 ing a Ford, probably a Model "T", and after he started it he saw no train, and the natural instinct of self preservation had caused him to look and be careful, as well as his desire to protect the children who were with him, some of whom were his guests and the others were members of his family.

Seeing no train coming, he started to cross the tracks. The limited train which was due in St. Louis in a very short time, came along, and must have been going at an exceedingly high rate of speed, because just before the train hit the car the fireman made an exclamation to the

engineer, and the engineer as he described it "put the air brakes in the nine hole" which means the emergency,—
157 and that train spit fire and creaked for half a mile before it could stop. In other words, the rear of the train was half a mile distant from the scene of the impact.

The Court felt in that case that due to the extremely high rate of speed at which the train was going, the fact that it could cover so much ground in a few seconds,—that it was probable,—if the deceased had seen it,—he would probably have felt that he could cross the track before the train could have gotten to the crossing,—but there was no evidence tending to show that he did see it. So in that case this Court felt that while the deceased had not done everything that could have been done to ascertain the danger that was imminent, that he nevertheless did fairly well—as well as an ordinarily prudent person would have done under the same circumstances.

The jury returned a verdict; motion for a new trial was made and denied, and judgment entered upon the verdict. And when that case reached the Court of Appeals, the Court of Appeals said that it was clearly within the Goodman case; and therefore the judgment was reversed. Now, in that case there was the exceedingly high and dangerous rate of speed,—in fact, in a few seconds that train would go further than the train in question in this case would go in going from the depot to the shops. In this particular case there is some testimony tending to show that the
158 train was going at the rate of twenty-five to thirty miles an hour,—I think that is the extreme testimony, and I think that is probably true, that is was going somewhere between twenty and thirty miles an hour.
72 And that speed used to mean a great deal to us, but since we have been riding in automobiles and watch the speedometers, we know that a speed of from twenty to thirty miles an hour is going pretty slow. Of course, it takes several miles for a passenger train, particularly a passenger train with six coaches attached to it,—it takes considerable steam and a considerable distance to reach a speed of thirty miles an hour; it can not be done in a couple of blocks. A couple of blocks is not more than twice the length of the train, and those trains don't pick up speed that way.

The trouble with all of us when we are using automo-

billes is that we get careless, and then if we get hurt by reason of our own carelessness we are very apt to want to lay it upon somebody else. And this plaintiff is in that regard no different from anybody else,—or any worse than anybody else, in the same circumstances, because people are inclined to get careless. They get used to passing cars going at forty and fifty and sixty miles an hour in perfect ease and perfect safety on the highway, and entirely lose sight of the fact that a speeding train cannot do anything except start and stop, increase speed a little and slow down; that is all they can do.
159 It has to run on rails and unless it runs on the rails there is a wreck in which many human lives may be lost.

The Court will not, of course, make the direction now, but I have said what I have said in order that counsel may have a general view of the way the Court feels about this case. I will think about it until tomorrow morning.

Mr. Marshal, adjourn court until ten o'clock tomorrow morning.

Adjourned until Ten O'clock, A. M. Thursday, June 23, 1932.

160 Federal Building, Springfield, Illinois,
Thursday, June 23, 1932,
Ten O'Clock, A. M.

73 Court Convened:

Pursuant to Adjournment.

Appearances:

Same as before.

The Court: In the case at bar, it seems to me that this case comes clearly within the Goodman case.

Mr. Wines: Except there was no wilful count in the Goodman case.

The Court: Well, in the light of the evidence, the Court would have to disregard that count, because there is no evidence of wilfullness in this case.

Justice Holmes says: "We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from respon-

sibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not
161 the train stop for him. In such circumstances it seems to us that if a driver can not be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look. It seem to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop."

In this case it is very clear that if the plaintiff stopped where he said he stopped, he stopped where he could not see very far down the track. If he had simply gone upon the side track and looked he could have seen probably to the Wabash depot. But it was daylight, and he didn't see it.

The motion for a peremptory instruction will have to be allowed, and while to the Court it is unpleasant to put a man who is so grievously injured as this man is, out
74 of court, under the decision of the Supreme Court of the United States he is responsible for his own condition, and not the railroad. The motion for a peremptory instruction will have to be allowed.

Gentlemen of the Jury, you are instructed to find the defendant not guilty; the Court will enter your verdict for you: "The jury find the defendant not guilty".

162 Gentlemen of the Jury, you may stand aside.

(To which ruling of the Court, the Plaintiff, by his counsel, then and there duly excepted.)

Thereafter, on to-wit, August 1, 1932, the Court entered judgment in favor of the Defendant and against the Plaintiff for costs of suit.

(To which entry of judgment, the Plaintiff, by his counsel, then and there duly excepted.)

And Now, in furtherance of justice and that right may be done, and for as much as the matters and things hereinbefore set forth do not otherwise appear of record, the Plaintiff tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that

the same may be settled, allowed and signed and sealed by the Court, and made a part of the record in this cause,

And the Same Is, Accordingly Done this 27th day of August, A. D. 1932.

LOUIS FITZHENRY,
Judge.

August 27, 1932.

We hereby approve the above and foregoing bill of exceptions.

ALLEN & CONVERSE
Attorneys for Defendant.

75 And afterwards, to wit: on the 19th day of October, A. D. 1932, there was filed in the office of the clerk of the said court, a certain Petition for appeal, assignment of error and order allowing appeal, which said petition for appeal, assignment of error and order allowing appeal are in the words and figures, following, to wit: Filed Oct. 19

76 (Caption)

APPLICATION FOR APPEAL.

Now come C. S. Andrus and W. St. J. Wines, Attorneys for the plaintiff in the above entitled cause, and pray an appeal to the United States Circuit Court of Appeals, Seventh Circuit. Entered Oct. 19

Dated at Springfield, Illinois, this 19th day of October, A. D. 1932.

C. S. ANDRUS
W. ST. J. WINES,
Attorneys.

ORDER.

It Is Ordered, that the appeal prayed be allowed upon condition that plaintiff give bond in the sum of Five Hundred Dollars with good sufficient security to be approved by the Clerk of this Court, within ten days from date of this order.

Entered this 21st day of October, A. D. 1932.

LOUIS FITZHENRY
Judge.

Endorsed: Filed Oct. 19, 1932 S. T. Burnett, Clerk.

77 * * (Caption) * *

ASSIGNMENT OF ERRORS.

The Court erred in directing the verdict for the defendant.

C. S. ANDRUS,
W. ST. J. WINES,
Attorneys.

Indorsed: Filed Oct. 19, 1930, S. T. Burnett, Clerk.

78 And afterwards, to wit: on the 27th day of October, 1932. A. D. 1932, there was filed in the office of the clerk of said court, a certain Bond on Appeal, which said Bond on Appeal was and is in the words and figures, following, to wit:

79 * * (Caption) * *

APPEAL BOND.

Know All Men by These Presents, that we, John Pokora, as principal, and Theresa Pokora, as surety, of the County of Sangamon and State of Illinois, are held and firmly bound unto the Wabash Railway Company, a corporation in the penal sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at Springfield, in the District and Division of the United States District Court aforesaid, this 27th day of October, A. D. 1932.

The condition of the above obligation is such, that whereas, the said Wabash Railway Company, a corporation, defendant, did on the first day of August, A. D. 1932, at a term of United States District Court holden at Springfield within said district, obtain a judgment against the above bounden, John Pokora in the above entitled cause for costs of suit, from which judgment the said John Pokora has prayed for and obtained an appeal to the United States Circuit Court of appeals in and for the seventh circuit.

Now, if the said John Pokora shall duly prosecute said appeal, and shall, moreover, pay the amount of all costs rendered and to be rendered against him, the said John Pokora,

in case the said judgment shall be affirmed in the said United States Court of appeals for the seventh circuit, then the above obligations to be null and void, otherwise to remain in full force and virtue.

80 JOHN POKORA (Seal)
THERESA POKORA (Seal)

Approved, October 27th, A. D. 1932 S. T. Burnett, Clerk.

(Caption)

THERESA POKORA, being first duly sworn doth depose and say that she is the owner of the following described real estate which is situated in the County of Sangamon and State of Illinois, the same being within the Southern Division of the Southern District of the United States District Court, towit:

A four room house and lot located at and known as 2216 East South Grand Avenue; also a four room house and lot located at and known as 2218 East South Grand Avenue, both of said parcels being situated in the County of Sangamon and State of Illinois.

The affiant further states that the said parcels are free and clear of any incumbrance or lien against the same and that the fair cash value of said parcels is not less than Three Thousand Dollars.

THERESA POKORA

Subscribed and sworn to before me this 27th day of October, A. D. 1932.

S. T. BURNETT,
(L. S.) *Clerk U. S. District Court, Southern District of Illinois.*

81 And afterwards, to wit: on the 27th day of October, A. D. 1932, there was filed in the office of the clerk of said court, a certain Praecipe for Transcript, which said Praecipe together with acknowledgment of service thereof, was and is in the words and figures, following, to wit:

82 (Caption)

PRAECIPE.

To S. T. Burnett, Clerk of the United States District Court for the Southern District of Illinois:

You are hereby instructed to prepare a record for appeal by John Pokora, plaintiff, to the United States Circuit Court of Appeals for the Seventh Circuit, containing:

A copy of the transcript from the Circuit Court of Sangamon County, Illinois, removing the above entitled cause to the United States District Court for the Southern District of Illinois.

Also a copy of all pleadings, motions and orders entered in this Court, including the judgment and appeal bond filed by the plaintiff, after removal of said cause to this court, and bill of exceptions heretofore filed herein.

C. S. Andrus,
W. St. J. Wines,
Attorneys for Plaintiff.

Received a true copy of the above praecipe, this 27th day of October, A. D. 1932.

Allen & Converse,
Attorneys for Defendant.

Filed: October 27, 1932. S. T. Burnett, Clerk.

84 United States of America
Southern District of Illinois } ss.
Southern Division

I, S. T. Burnett, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full transcript of the proceedings had of record and on file in the case entitled John Pokora vs. The Wabash Railway Company, a corp. No. 18189, made in accordance with praecipe for transcript filed therein, as fully as the same appear from the original files and records thereof, now in my office remaining.

And I further certify that the Original Bill of Exceptions (Narrative Form) has been incorporated in said transcript of record.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 4th day of November, A. D. 1932.

S. T. BURNETT,
Clerk.

(Seal)

83 United States of America } ss.

The President of the United States, To The Wabash Railway Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Southern Division, wherein John Pokora, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis FitzHenry, Judge of the District Court of the United States, this 20th day of October, in the year of our Lord one thousand nine hundred and thirty-two.

LOUIS FITZHENRY,
U. S. District Judge for the Southern District of Illinois.

Service of the foregoing Citation and receipt of a copy thereof, is acknowledged this 31st day of October, A. D. 1932.

ALLEN & CONVERSE,
Attorneys for defendant-appellee.

Endorsed: * * (Caption) * *. Citation. Returnable November 19, 1932. S. T. Burnett, Clerk. Filed Oct 31 1932, S. T. Burnett, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 61, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on the twenty-third day of November, 1932, on which the following entitled cause was heard and determined:

John Pokora,

Appellant,

vs.

The Wabash Railway Company, a Corporation,

Appellee,

No. 4876, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of September, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-seventh.

4876 John Pokora *vs.* The Wabash Railway Company } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

And afterwards, to-wit: On the eighth day of November, 1932, there was filed in the office of the Clerk of this Court, an appearance of Counsel for Appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932.

John Pokora,
Appellant,

vs.

The Wabash Railway Company,
Appellee.

The Clerk will enter our appearance as Counsel for Appellee.

WALTER M. ALLEN,
HENRY A. CONVERSE,
Security Bldg.,
Springfield, Illinois.

Endorsed: Filed November 8, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1932, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932.

John Pokora,

Appellant,

vs.

The Wabash Railway Company;

Appellee.

The Clerk will enter our appearance as counsel for appellant.

W. ST. JOHN WINES,
CHARLES S. ANDRUS,
Springfield, Illinois.

Endorsed: Filed November 15, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eleventh day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 11, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Robert C. Baltzell, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Robert C. Baltzell, District Judge.

John Pokora
4876 *vs.*
The Wabash Railway Company

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 21, 1933.

And afterwards, to-wit: On the twenty-first day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Friday, April 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

John Pokora
4876 *vs.*
The Wabash Railway Company

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of Counsel and on oral arguments by Mr. W. St. John Wines, counsel for appellant, and by Mr. Henry A. Converse, Counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixth day of July, 1933, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932, April Session, 1933.

JOHN POKORA, *Appellant.*

vs.

THE WABASH RAILWAY COMPANY, a Corporation, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

July 6, 1933.

Before ALSCHULER, EVANS and SPARKS, *Circuit Judges.*

By this action appellant seeks to recover damages alleged to have been sustained by him as a result of being struck by appellee's railway train at a grade crossing in Springfield, Illinois. The first count of the declaration contained a general charge of negligence; the second count described the environment in detail and alleged special negligence on the part of appellee in that it placed certain freight cars on a switch track in close proximity to the intersection in question, and that it had operated its train toward the intersection at a high and dangerous rate of speed; the third count charged a wilful and wanton injury, again describing the environment with particularity. At the conclusion of appellant's evidence the court instructed the jury to find for appellee which it did, and judgment was thereupon entered for appellee for costs.

SPARKS, *Circuit Judge.* Viewed in the light most favorable to appellant, the evidence submitted supports the following facts: Tenth Street in the city of Springfield runs north and

south. It is intersected by Edwards Street which runs east and west, and at this point the accident happened. Appellee's railway tracks and station are located on Tenth Street, and the station is five city blocks due north of Edwards Street. At the intersection referred to appellee has four tracks. East of and parallel with the main track is one switch track and on the west of the main track there are two switches. On the north-east corner of the intersection of the streets there is located an ice plant. Its main building is flush with the west and south property lines and has a frontage of about eighty feet on Edwards Street. The west property line of the ice company is parallel with the railroad tracks and is seventeen and a half feet east of the east rail of the east switch and thirty and a half feet east of the east rail of the main track. Thirty feet east of the main building, and seven and a half feet north of its south line is located the ice company's service station which has a frontage of thirty feet on Edwards Street. Fifteen feet east of the service station is a public alley running north and south. Edwards Street is eighty feet in width between property lines. The traveled portion is thirty feet in width and is paved with brick to the extended west property line of the ice company, and with macadam from that point to the first railroad track. The north line of the pavement is twenty-five feet south of the south property line of the ice company, and thirty-two feet south of the loading platform of the ice service station. At the intersection of the paved portion of Edwards Street and the alley, which is about 175 feet east of the first railroad track, a driveway runs northwestwardly to the service station, and returns southwestwardly to the paved portion of Edwards Street at about 90 feet east of the first track.

Appellant was engaged in the grocery and retail ice business and purchased his ice from the company referred to. On the morning of August 17, 1929, he left his home at 5:45 a. m. when it was daylight, and with his automobile truck drove to the ice plant for the purpose of securing ice. He decided to go across the tracks to another plant of the same company which was located at the southwest corner of Edwards and Tenth Streets. A string of box cars was standing on the east switch track at a point from forty-two to forty-eight feet north of the center of Edwards Street. At that time the scoring machine composed of eight saws (used for sawing ice) was running and caused a loud singing noise

which could be heard for the distance of a city block. Before entering upon the tracks, appellant stopped his truck at a point from ten to fifteen feet east of the east switch. He remained in the truck and without stopping his engine looked north and south and listened for trains. Not hearing or seeing any, he drove across the switch track and upon the main track and was there struck by a south bound passenger train which had stopped at the station and was then traveling at an estimated speed of from twenty-five to thirty miles per hour without sounding the bell or whistle. Appellant's witnesses are not in accord as to the location of the rear end of the train when it stopped. They place it at different points from barely south of Edwards Street to one hundred and fifty feet below that point.

Appellant had been in the habit of getting ice from both ice houses for the past ten years and was fully acquainted with the surroundings. He usually went any time from six to seven thirty o'clock in the morning, and had crossed the tracks at that point for the purpose of getting a quicker delivery of ice very frequently. He knew that there was an early morning south bound train and had seen it pass that place on many other days. On the morning of the accident no one was in front of him at the crossing; the watchman was not there, and appellant knew that he did not come on duty until seven o'clock.

The trial court based its peremptory instruction upon the authority of *Baltimore and Ohio R. Co.* v. *Goodman*, 275 U. S. 66, and *Wabash R. Co.* v. *Zayac*, 30 Fed. (2d) 764. Appellant, however, seeks to distinguish those cases from the instant case by the fact that neither driver of those automobiles stopped his car before driving on the track, and by the further fact that in the Goodman case the accident occurred at a country grade crossing, and in the *Zayac case* it occurred three blocks inside the limits of a small city where nothing obstructed the driver's view, while in the instant case, the crossing was in a thickly settled portion of a large city where the driver was prevented from seeing the approaching train by the ice company's building and the freight cars on the switch. It may be said, however, that if appellant stopped his truck within ten to fifteen feet from the east switch, as he stated, the ice company's building could not possibly have interfered with his vision of the train.

In the *Goodman case, supra*, the Court said, at page 69:

"We do not go into further details as to Goodman's

precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. * * * It is true as said in *Flannelly* v. *Delaware & Hudson Co.*, 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. See *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, 417, 419."

It may be true that the crossing in that case was in a country district, although the opinion does not so state, yet we are unable to understand why the rule there laid down does not apply to a crossing in a city as well as in the country; if it were otherwise a traveler would be required to exercise more care in crossing a railroad track in the country where his vision was less obstructed than in a congested city where it is more restricted. The railroad company and the traveler are each required to exercise ordinary care at all grade crossings. Ordinary care is a relative term and varies with audible and visual environment rather than with strict geographical location. The law interprets ordinary care to be that degree of care which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that may result from the neglect. *Illinois Central R. Co.* v. *Cheek*, 152 Ind. 663.

If appellant stopped his truck within ten to fifteen feet from the east switch, as he stated, the ice company's building could not then have interfered with his vision of the train, and the box cars constituted the only obstruction of his vi-

sion to the station, which was five blocks away. He was then twenty-eight feet from the main track and about forty feet southeast of the box cars. He could then see the main track for a slight distance north of the south end of the first box car, and that distance rapidly increased northwardly as he traveled west, so that when he reached the west rail of the switch, which was eight feet from the main track, his vision of that track was clear.

The charge of wilfull injury is not supported by substantial evidence and we think the facts proven are well within the rule of the *Goodman case*. The fact that appellant stopped his car twenty-eight feet back of the main track is not sufficient to distinguish one case from the other, for if he could not see by reason of the box cars, and could not hear on account of the scoring machine and the noise of his own motor, it was his duty under the authority of the *Goodman case* to take further precautions.

JUDGMENT AFFIRMED.

ALSCHULER, *Circuit Judge*, dissenting. In my judgment *B. & O. R. Co.* v. *Goodman*, *supra*, is not here applicable. What was there said was with reference to a crossing in the country where the view along the track to one on the highway approaching the railroad crossing was partly obstructed by a building just off the railroad right of way. Here the crossing was in a populous and busy part of a large city.

Tenth street, which the railroad occupies, is 66 feet wide. In the center is the main track. East of the main track is a switch track, and west of the center two switch tracks. On the northeast corner of Edwards and Tenth streets there is a large ice house. A string of box cars was standing on the east switch track north of Edwards street, extending to within a very few feet of the north sidewalk on Edwards street. Two witnesses testified there were box cars on each of the two east tracks, but in view of the plat which appellant offered in evidence this is probably an error. In the briefs and arguments no contention is made that there were box cars on the two east tracks.

The building alone would not have obstructed the view to the north when one reached the east line of Tenth street. But the string of cars on the east track was not only an obstruction to full view north along the main track, but would have been a menace to safety to one stopping on the east track to look and listen for approaching trains, because

one could not know whether at the north end of the cars there was an engine which might at any time push the cars toward the south. The cars cut off the view for any substantial distance north on the main track to one approaching from the east until he came past the overhang of the standing cars; and since one driving an automobile is some distance from its front, the front of the car would be very close to, if not upon, the east rail of the main track before the driver of the car would have full view north.

Had appellant gone forward upon the switch track before stopping to look and listen, he would have encountered the new danger of possible movement of the string of box cars. He stopped just before reaching that track, and several automobiles behind him stopped also. There he looked and listened and, seeing no danger and hearing no warning, proceeded to cross. With the necessary momentum acquired to reach the place where he did have full view north on the main track, it is at least problematic whether on reaching the switch track he could have stopped the car in time to avoid the collision, even if he then saw the approaching train a few rods away.

It appears in the Goodman case that when the building which would obstruct the view from farther back had been passed, there was full view of the track, and time to stop before reaching it. Quite different in this respect is the case at bar, where after passing the building there were yet the box cars which obstructed the view and prevented stopping to look and listen at any place nearer the main track than that at which appellant did stop.

True, appellant was familiar with this crossing. He lived some distance east of the tracks, and in his business required ice daily. When, as he often did, he came early in the morning for ice, he usually got his supply from the ice house just east of the tracks. But this was an unusually busy morning. The State Fair was in progress, and the platform where most generally he got his ice was occupied by others who preceded him there for the same purpose. He was told by the man in charge that it would be twenty minutes before he could be served, and that he had better go to an ice house just west of the tracks, which he proceeded to do. He crossed these tracks more or less every day, but the early morning trip for ice did not usually involve the crossing of the tracks.

While he stated that he knew generally a passenger train passed there about that time, he says he did not pay attention to the train. He testified he supposed the train had already gone, or, if not, that it was late. Another witness, whose place of business gave him full view of the trains, said the train that morning was ten or fifteen minutes late and was running unusually fast. So even if appellant definitely knew the regular time of that train, he had no means of knowing what time it would go through if it was late, if, indeed, he was not justified in assuming it had already passed.

Pokora testified that when he crossed the tracks early in the mornings sometimes there was a flagman there and sometimes there was not. He testified definitely to stopping, looking and listening, and other witnesses abundantly corroborated him, especially those who waited behind him to make the same crossing and followed him as he proceeded across.

If, under these circumstances, and without oral or visual indication of an approaching train, the suggestion of the Goodman case were applied—that he leave his car, go forward afoot to the main track to see whether a train was approaching in either direction, and then, returning to his car, start it up and drive across the tracks—it seems to me that he would be inviting disaster more probable than was reasonably to be anticipated from doing what he did. By the time he returned to and entered his car, started it and drove it to the main track, a swiftly running train, which may not have challenged his attention when he was there before, might have come upon him.

There have been quite a number of cases wherein Circuit Courts of Appeals have distinguished the Goodman case, and have supported recoveries in railroad crossing accidents where persons attempting to cross tracks in an automobile did not go to the rarely exceptional extreme of leaving the car and going forward to see if a train was approaching. Among them are *C. & O. Ry. Co.* v. *Waid*, 25 F. (2d) 366 (C. C. A. 4); *Norfolk & W. Ry. Co.* v. *Holbrook*, 27 F. (2d) 326 (C. C. A. 6); *Canadian Pac. Ry. Co.* v. *Slayton*, 29 F. (2d) 687 (C. C. A. 2); *Leuthold et al.* v. *Penna. R. Co.*, 33 F. (2d) 758 (C. C. A. 6); *Teague* v. *St. L. S. W. Ry. Co.*, 36 F. (2d) 217 (C. C. A. 5). In the first and last of these cases certiorari was applied for and denied. 278 U. S. 629; 281 U. S. 733.

Proof of appellee's negligence was manifestly sufficient to

send that issue to the jury. To an unusual degree of certainty the evidence for appellant shows that no bell was rung or whistle sounded, and no alarm whatever given of the approaching train. I believe that under these circumstances, in this populous locality, at this busy crossing, where the duty of the railroad company must be reasonably commensurate with known perils, one driving across the track may, to a reasonable degree, rely upon his ascertainment of the absence of all statutory warning of an approaching train as some assurance that no approaching train is in hazardous proximity.

I believe that the evidence required submission to the jury of the question of appellant's contributory negligence, and that it was error to direct the verdict for appellee.

Endorsed: Filed July 6, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the sixth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, July 6, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

4876. John Pokora *vs.* The Wabash Railway Company } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 65 to 75, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel, and stipulations, motions and orders relating to the filing of briefs) in the case of

John Pokora,

Appellant,

vs.

The Wabash Railway Company, a Corporation,

Appellee,

No. 4876, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of September, A. D. 1933.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Oct. 5, 1933

Upon consideration of the application of John Pokora and upon good cause shown, the time for applying for a review upon certiorari of the judgment of the Circuit Court of Appeals of the Seventh Circuit in the above entitled cause rendered on July 6, 1933, is hereby extended for a period of forty (40) days from this date.

Dated at Washington, D. C., October 4th, 1933.

Willis Van Devanter, Associate Justice.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
NOV 13 1933
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 585

JOHN POKORA, PETITIONER,

VS.

THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PETITIONER IN SUPPORT THEREOF.

W. St. John Wines, Esq.,
Charles S. Andrus, Esq.,
Counsel for Petitioner.

Walter M. Allen, Esq.,
Henry A. Converse, Esq.,
Counsel for Respondent.

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PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PETITIONER IN SUPPORT THEREOF.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John Pokora, by W. St. John Wines, his attorney, respectfully represents:

STATEMENT OF THE CASE.

This action was brought to recover $50,000.00 damages alleged to have been sustained by John Pokora as a result of being struck by a Wabash Railway train at a grade crossing in the City of Springfield, Illinois. At the conclusion of the evidence for the plaintiff, Judge Louis FitzHenry directed a verdict for the defendant. The only error assigned is the action of the trial judge in directing a verdict for the defendant. This suit was originally started in the Circuit Court of Sangamon County and later removed to the United States District Court by the defendant.

The first count of the declaration contained a general charge of negligence, a very serious and permanent injury to the plaintiff, and the destruction of his automobile truck which was struck by the train. (Tr. 4.) The second count of the declaration was a special negligence count setting up the environment in detail and alleging, among other things, that the defendant had negligently placed certain freight cars on a switch track in close proximity to the intersection in question, and that it negligently operated its train toward the intersection at a high and dangerous rate of speed, whereby the plaintiff was injured. (Tr. 5.)

The third count of the declaration, which was most strongly relied on by counsel for plaintiff, was a count charging a willful and wanton injury inflicted on the plaintiff by the defendant. (Tr. 7.) In this count the environment was set forth in great detail, alleging that

the defendant was operating a passenger train south on Tenth Street approaching the intersection of Edwards Street, both of said streets being closely built up and being in a thickly populated section of the city, approximately five blocks south of defendant's passenger station; that on the day in question and for a long period of time immediately prior thereto, the defendant had not maintained a flagman at said intersection, at the hour in question, nor any crossing gates, nor any signal device of any kind to warn persons about to cross said railroad tracks; that a certain building at the northeast corner of said intersection was built flush with the sidewalk line and obstructed the view to the north of persons driving west on Edwards Street toward said railroad tracks; that the defendant was using four tracks which crossed said intersection, the east one of said tracks being used as a storage track for freight cars which had been placed on said track to within a few feet of the north line of Edwards Street which cars further obstructed the view; that persons travelling west on Edwards Street towards said tracks were peculiarly and extraordinarily exposed to danger unless said trains approaching said intersection from the north were travelling and operating with especial care and caution and at a low and moderate rate of speed, all of which facts were then and there well known to the defendant. That at about six o'clock A. M., on the day in question, plaintiff was driving his automobile truck west on Edwards Street and that before crossing or attempting to cross said tracks he stopped his automobile adjacent to said tracks, looked in both direc-

tions and listened for the sound of an engine bell or whistle to ascertain whether any train of the defendant was approaching said intersection; that he saw no train approaching from either direction and that no bell or whistle on any approaching engine was rung or sounded by the defendant, whereupon he started his automobile and attempted to cross said track; that as he drove on to the second or main track he saw an engine and train of cars approaching from the north at a high and dangerous rate of speed, but it was then too late for him to either stop his car or clear the track. That in view of the premises heretofore stated, the defendant then and there, by its servants, with intentional disregard of its duties in that behalf and with a disregard of the consequences to persons lawfully using said intersection, and with a willingness to inflict injury upon any such user of said intersection, drove the said engine against the automobile in which the plaintiff was riding and he was thereby seriously and permanently injured, wherefore the plaintiff avers that the injuries then and there inflicted upon him by the defendant were willfully and wantonly inflicted.

After removal of this cause the defendant filed a plea of the general issue (Tr. 21); a special plea alleging that the injury and damage to the plaintiff and his automobile was the result of the negligence of the plaintiff; a second special plea to the first and second counts of the declaration alleging that the injury to plaintiff and his automobile was the result of contributory negligence on the part of the plaintiff; a third special plea to the third count of the declaration alleging that the plaintiff

willfully and with reckless and conscious disregard of his own safety and of the automobile operated by him and of the safety of passengers and employees on trains of the defendant, approached and went upon said crossing without exercising any reasonable precaution to discover the approach of a train upon said tracks, and that the conduct of plaintiff in so approaching said crossing was willful and wanton and contributed to the injuries and damages complained of by the plaintiff; and a fourth special plea alleged that the defendant was not the owner of said automobile, nor did he have any right, title or interest in and to the same.

Later the defendant joined issue on the plea of the general issue, demurred to the first and third special pleas, and by replication joined issue on the second and fourth special pleas. (Tr. 23.)

The demurrer to the first and third special pleas was argued. The defendant entered a motion to carry the demurrer to said pleas back to the third count of the declaration (Tr. 25), but the court denied said motion and in the same order (Tr. 26) overruled the demurrer to the first special plea and sustained the demurrer to the third special plea. The effect of this order will be discussed in the argument.

On June 22, 1932, a jury was selected to try this case (Tr. 26), and trial was entered upon and on the following day at the conclusion of all of the evidence offered in behalf of the plaintiff, the trial judge instructed the jury to return a verdict finding the defendant not guilty. An appeal to the Circuit Court of Appeals was thereafter perfected.

To sustain the charges contained in the declaration of the plaintiff, fifteen witnesses were introduced. Wade Seeley (Tr. 29), a civil engiener and surveyor for the past twenty-seven years, identified a plat made by him of the intersection in question, showing in detail the location of the tracks, width of the streets, location of the buildings, obstructions to the view of persons travelling west on Edwards Street, and various measurements appearing on the plat. This plat was introduced without objection and is most important in the opinion of counsel for the plaintiff. Attention will be called to it later in the argument.

John Pokora, plaintiff (Tr. 29), testified that he was engaged in the grocery and ice business and that on August 17, 1929, the morning in question, he left home at 5:45 A. M., in his truck for the purpose of securing a load of ice from the ice house at Tenth and Edwards Streets. The ice company maintains a large three-story building at the northeast corner of said intersection and another large building at the southwest corner of said intersection, which was on the opposite side of the Wabash tracks. He stopped first at the building on the east side of said tracks, but as there were many trucks waiting there for ice he decided to go to the other ice house on the west side of the tracks. A string of box cars had been set on the east switch track, which is adjacent to the ice house on the northeast corner, and were placed within a few feet of the north line of Edwards Street. He stopped his truck before venturing on to this switch track, looked and

listened, and hearing no train coming, started his car up, crossing the switch track close to the box cars which were standing there, and as he emerged from behind the box cars he was struck by a passenger train bearing down upon him from the north. He described his injuries in detail which, as the court will perceive from this record, were extremely serious and permanent.

On cross examination Pokora stated he had been in the ice business for nine or ten years and used about three truck loads a day. On the day in question he was down there about six o'clock A. M., but on other days during the summer he would go for ice about 7 or 7:30 A. M., and that if the ice house on the east side of the tracks were busy he would go to the one on the west side. He had seen that train go through on other days. He knew there was a railroad track there and had crossed it many times. He had seen a watchman there after seven o'clock in the morning. As he approached the first track he stopped his truck, looked to the north and then started it up again when he was struck. (Tr. 31-33.)

Mike Ushman testified that he was driving an automobile right behind Pokora at the time in question; that Pokora was driving west on the north side of the street and stopped ten or fifteen feet before he got to the track, then went ahead and his truck was struck by the train. Ushman did not hear any whistle sounded by the train, nor any bell. He stated that the back end of the train ran five or six hundred feet south of the Edwards Street crossing before it stopped. (Tr. 34.) On

cross examination he stated that Pokora went by the first ice house slow, looking in there, then went on toward the track and stopped. He was ahead of the witness and the witness could not go past him. Pokora then started up and the first the witness knew that there was going to be an accident was when he heard the crash. The train hit Pokora, not Pokora the train. The witness saw the box cars standing on the track close to Edwards Street. (Tr. 35.)

Henry Buckholdt, an eleven year old boy, lived one block east of the tracks at 11th Street. The boy was out in front of his father's bakery and saw Pokora going west toward the tracks. Pokora had stopped before starting across the tracks, then started up again when the train hit him. The witness ran to the scene of the accident and saw Pokora lying at a switch on the east side of the track. (Tr. 35.)

Henry A. Buckholdt, Sr., father of the lad, stated he could ordinarily hear a whistle when blown or a bell when rung, but he did not hear any bell or whistle on that train that morning. (Tr. 37.)

Henry Roy was also driving a car behind Pokora. The cars ahead of the witness stopped. Witness did not hear any whistle or bell. He stated that the train ran 100 to 150 feet south of the crossing before it stopped. (Tr. 37.)

Otto Goetz was in charge of the loading platform at the ice house on the east side of the track. He did not hear the crash on account of the noise of the ice machine, but when he learned that there had been an

accident he went over and helped pick Pokora up. He stated that Pokora had previously stopped at his ice house for ice, but the witness waved him on across the tracks as that platform was croweded. (Tr. 39.)

Dr. Irving Metz, a practicing physician for thirty years, attended Pokora from the date of his injury on August 17, 1929, up to the time of the trial. Pokora had a fracture at the base of the skull, extending back along the parietal margin and into the occipital region. He had a comminuted fracture of the right leg at the juncture of the upper and middle third; a compound comminuted fracture of the left leg at the juncture of the lower and middle third; a rupture of the ear drum, and numerous bruises and abrasions over the body. A number of X-ray pictures were taken and exhibited and explained to the jury. (Tr. 41.) The hospital bill amounted to $617.99 and the doctor bill to $800.00. (Tr. 42.) At the time of the trial the legs were healed with the exception of a small opening in each leg, which exudes serum. A spiculum or sliver of bone worked out about a week ago. The bones had been shattered and practically none of those pieces had been removed from the locus. (Tr. 43.)

Doctor Arthur E. Walter, eye, ear, nose and throat specialist, testified that he examined Pokora on the morning of the trial and that he had a rupture of the right ear drum. He could hear a watch tick on contact, but normally he should be able to hear a watch tick at from 24 to 30 inches. (Tr. 44.)

Fred C. Sharafin testified that he sold the Federal motor truck to Pokora for $1,500.00; that he examined it

after it had been struck by the Wabash train and it was beyond repair. (Tr. 44.)

James B. Yates, a motor mechanic, testified that he examined the truck after the wreck and that it was beyond repair. (Tr. 44.)

Roland Burris lived in the first house on the north side of Edwards Street west of the track. He stated he did not hear any whistle or bell sounded, by that train, that he did not pay much attention to it. (Tr. 45.) He stated that the last coach on the train was past the south side of the sidewalk, a little ways. On cross examination he stated that the train was 50 or 75 feet south of the crossing, and that he noticed the freight cars standing on the east track, which cars were about six or eight feet from the sidewalk line. (Tr. 46.)

Mrs. Eva Burris, the wife of Roland Burris, was seated on her front porch reading the paper. She did not hear any whistle blown or any bell rung on the train that morning. She stated that the back end of the train was just beyond the sidewalk line on the south side of Edwards Street. She noticed a box car standing on the switch track. (Tr. 47.) On cross examination she stated in substance that she was sure she did not hear any bell.

M. R. Hodges, a salesman for the Springfield Produce Company, which is located on Tenth Street two blocks north of the intersection in question, described the location of various buildings along the tracks, that the Wabash tracks are four blocks east of the public square, that the section in question is not residential at all, but a business section, that he observed the

Wabash train going south that morning and as it passed his place of business that morning it was going 25 or 30 miles per hour, like it was making up time; it was past time. Train passes within 25 feet of his chair, he has pretty good ears, and did not hear any bell or whistle as it passed. (Tr. 48.)

Clarence Stanberry was an employee of the ice company, as a driver of one of their wagons. At the time Pokora's truck was struck by the train he was loading ice cubes on Edwards Street. His attention was attracted when he heard the train hit the truck. He stated that he did not hear any whistle blown, nor bell rung and could have heard it if one had been sounded. He went to the place where Pokora was lying and described the situation. (Tr. 50.)

Plaintiff here rested his case (Tr. 52), and a motion for a directed verdict was entered and argued after the jury had been excused.

CONTESTED ISSUES AND ERRORS RELIED ON.

No evidence was offered on the trial in behalf of the defendant, hence, there was no contested issue of fact, so far as evidence is concerned, as to the speed of the train at the time in question, as to the obstructions to the view of a traveler approaching the tracks, nor as to the failure of the train crew to ring a bell or sound a whistle while passing through a closely built up business district of the City of Springfield, nor as to the absence of a flagman, crossing gates, or other warning devices to travelers.

The various pleas filed by the defendant did raise issues of fact, but the trial court held as a matter of law that under the holding of the Supreme Court in the Goodman case, and the holding by the Circuit Court of Appeals in the Zayac case, the trial court felt compelled to perform an unpleasant duty against a man who is so grievously injured as this man is. (Tr. 56.)

Appellant contends that the decisions in *B. & O. R. R. v. Goodman*, 275 U. S. 66, and *Wabash R. R. Co. v. Zayac*, 30 F. (2nd) 764, are inapplicable to the facts presented by the evidence offered in the instant case, and that the evidence offered for plaintiff, for the purpose of the motion for a directed verdict, should be taken as true. The view of counsel for appellant as to the differentiation which should be made between the instant case and the cases referred to, will be suggested in the argument.

W. St. John Wines,
Counsel for Petitioner.

BRIEF OF AUTHORITIES AND PROPOSITIONS OF LAW RELIED ON.

I.

The statement in the case of *B. & O. R. R. Co.* v. *Goodman*, 275 U. S., page 66, in which it is stated, "it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look," was rendered in a crossing case in the country where trains may operate without any restricted speed limits, and is not applicable to travellers in populous cities who are about to cross railroad tracks.

II.

All grade crossing injury cases do not fall within the "applicable standard of conduct" mentioned in the *Goodman* case. The jury have a right to find the character and extent of traffic, the extent and kind of the obstacles to view, both artificial and natural, the composite effect of the environment, including failure to maintain special warning signals, the speed of the train, and that such composite effect may, under all the circumstances, amount to negligence (or wilfulness) on the part of the railroad company.

Norfolk & W. Ry. Co. v. *Holbrook*, 27 Fed. (2nd) 326.

Erie v. *Weinstein*, (C. C. A.) 166 F. 271.

III.

"There have been quite a number of cases wherein Circuit Courts of Appeals have distinguished the Goodman case, and have supported recoveries in railroad crossing accidents where persons attempting to cross tracks in an automobile did not go to the rarely exceptional extreme of leaving the car and going forward to see if a train was approaching. Among them are *C. & O. Ry. Co.* v. *Waid*, 25 F. (2d) 366 (C. C. A. 4); *Norfolk & W. Ry. Co.* v. *Holbrook*, 27 F. (2d) 326 (C. C. A. 6); *Canadian Pac. Ry. Co.* v. *Slayton*, 29 F. (2d) 687 (C. C. A. 2); *Leuthold et al.* v. *Penna. R. Co.*, 33 F. (2d) 758 (C. C. A. 6); *Teague* v. *St. L. S. W. Ry. Co.*, 36 F. (2d) 217 (C. C. A. 5). In the first and last of these cases certiorari was applied for and denied. 278 U. S. 629, 281 U. S. 733."

Dissenting opinion by Alschuler, Circuit Judge. (Tr. 74.)

IV.

Ches. & O. Ry. Co. v. *Waid*, 25 F. (2d) 366, discusses the Goodman case and differentiates it; and in discussing the matter says, that "one of the circumstances is the rightful expectation of the traveler that the railroad will perform the duty required by law and by ordinary care, of warning him by sounding a locomotive bell or whistle on approaching a crossing. Whether a traveler on a highway has looked and listened as a man of ordinary prudence would, is generally a question for the jury."

V.

Canadian Pac. Ry. Co. v. *Slayton*, 29 F. (2nd) 687 (1928), Second Circuit, opinion by Justice Manton, distinguishes the Goodman case and affirms a verdict by a jury in favor of plaintiff. The injury occurred in a village of 7,000 inhabitants and the opinion states that defendant in error's intestate was driving at about 10 miles an hour and looked and listened, but the opinion does not state that he stopped before attempting to cross the tracks. In the instant case the plaintiff stopped, looked and listened. The plaintiff was struck at a busy intersection of a city containing 71,864 inhabitants, and at a place where the defendant railroad company had placed cars which obstructed the view, and without sounding a whistle or bell as the train approached the intersection.

VI.

Luethold v. *Penna. R. Co.*, 33 F. (2nd) 758, appealed from the sixth circuit, June, 1929, discloses that the plaintiffs were injured when they drove onto a railroad crossing in Bucyrus, Ohio, at a speed of 10 or 12 miles an hour, without stopping, where the view was obstructed by sheds and buildings, where a flagman was usually stationed but who was not present at the time; that there was negligence in operating the train at excessive speed and in failing to signal its approach to the crossing. The Court of Appeals held that *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, did not govern, and reversed and remanded the case for submission to a jury.

VII.

The case of *Teague v. St. Louis S. Western Ry. Co.*, 36 F. (2nd) 217, is on all fours with the instant case. The collision occurred in daytime at a crossing in the City of Texarkana and was based on the alleged negligence of appellee in failing to maintain a proper warning of the approach of the train. The appellant stopped, looked and listened but his view was obstructed by tank cars on a side track in the direction from which the train came. The testimony showed that there were many automobiles on the street, that the train was coasting and making but little noise, and that an electric gong at the crossing was out of order. The trial court directed a verdict under *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, but the Court of Appeals reversed and remanded for submission to a jury. Certiorari in the Supreme Court was denied.

VIII.

Wilfulness may be defined as an intentional disregard of a known duty necessary to the safety of a person, and an entire want of care for the life or the person of others, when it exhibits a conscious indifference to consequences. It is not necessary to show that the person charged with wilfulness was actuated by ill will, or had prior knowledge that the person injured was in such a position as to be likely to be injured, but, in order to prove wilfulness it is enough if the evidence shows such gross misconduct on the part of the defendants or their employes as implies a dis-

regard of the rights and the safety of the public generally and a willingness to inflict injury.

Taylor, Admr., v. *Wheelock et al.*, 249 Ill. App. 152 (157-161).

Bremer v. *L. E. & W. R. R. Co.*, 318 Ill. 11 (pages 17 *et seq.*).

L. S. & M. S. Ry. Co. v. *Bodemer*, 139 Ill. 596 (606).

Walldren Express Co. v. *Krug*, 291 Ill. 472 (476-477).

IX.

The defense of contributory negligence does not apply to injuries wilfully or intentionally inflicted.

Rost v. *Noble & Co.*, 316 Ill. 357 (374).

Walldren Ex. Co. v. *Krug*, 291 Ill. 472 (476 *et seq.*).

Heidenreich v. *Bremner*, 260 Ill. 439 (446 *et seq.*).

Wab. R. R. Co. v. *Speer*, 156 Ill. 244 (251).

X.

Where the averment is made that the injury was wantonly and wilfully inflicted, it is a question for the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences or a willingness to inflict an injury.

Walldren Ex. Co. v. *Krug*, 291 Ill. 472 (476).

Vette v. *Sanitary District*, 260 Ill. 432 (438).

I. C. R. R. Co. v. *Leiner*, 202 Ill. 624 (629).

L. S. & M. S. Ry. Co. v. *Bodemer*, 139 Ill. 596 (606).

XI.

Where a charge of wilful and wanton conduct on the part of the defendant resulting in injury to the plaintiff is made, the defendant is not entitled to set up the defense that the wilful conduct of the plaintiff contributed to his injury and that therefore there can be no recovery.

Central of Georgia Ry. Co. v. *Partridge*, 136 Ala. (587).

L. & N. R. R. Co. v. *Orr, Admr.*, 121 Ala. 489 (499).

L. & N. R. R. Co. v. *Markee*, 403 Ala. 160 (170) Reptd. also in 15 So. 511, and 49 A. S. 21.

SUMMARY OF ARGUMENT.

At the conclusion of the evidence offered in behalf of petitioner, the trial court, on motion of the defendant, instructed the jury to find a verdict in favor of the defendant. The court announced that the instruction was given in accordance with the views expressed by the Supreme Court of the United States in the *Goodman Case*, 275 U. S. 66, and the *Zayac Case*, decided by the Circuit Court of Appeals, Seventh Circuit, 30 Fed. (2nd) 764.

The argument in this case differentiates it from the two cases just mentioned in that in those cases the drivers of the automobiles in question failed to stop before attempting to cross the tracks. The argument stresses the fact that in the *Goodman* case, the injury was inflicted at a grade crossing in the country where there is no restriction as to the speed at which a train may travel. In the *Zayac* case, the opinion discloses that while the injury was inflicted three blocks inside the limits of the

Village of Staunton, there was nothing that obstructed the view for a long distance. A further differentiation is stressed, in that the instant case contained a count charging a wilful and wanton injury whereas the *Goodman* and *Zajac* cases contained no such count.

On demurrer filed by the defendant to the wilful and wanton count, the court held such count good. This count sets up the environment and is a count which has been held good many times by Illinois and other courts. It alleges certain obstructions to the view of a traveler about to cross the railroad tracks at the intersection in question, including freight cars placed by the defendant on a sidetrack adjacent to the intersection, which sidetrack the plaintiff was obliged to cross before crossing the main track on which the train was running, which struck plaintiff's automobile, that the intersection in question was a closely built up business section of the City of Springfield; that the train was running at a high and dangerous rate of speed and that no whistle was sounded nor was any bell rung as the train approached said intersection. It is contended that where there is a wilful and wanton count that contributory negligence is not a defense to an injury so inflicted, and that there was sufficient evidence tendered to support the wilful and wanton count to require the submission of the case to the jury for its consideration.

ARGUMENT.

It is perhaps not unfair to state that before this suit was commenced counsel for appellant were familiar with the *Goodman* and *Zayac* cases and that this suit never would have been instituted by present counsel for appellant if appellant had attempted to cross the tracks in question without coming to a full stop, looking and listening. Nor would this case have been started had it been a grade crossing case in the country.

It is fair to presume that counsel for appellant were entirely familiar not only with the testimony which appellant was expected to give in his own behalf, but were likewise familiar with the testimony of Mike Ushman (Tr. 34) and Henry Roy (Tr. 37), who were in two cars next behind appellant and who were compelled to stop by reason of the fact that appellant stopped before attempting to cross the tracks.

The testimony of appellant, which, for the purpose of the motion to direct a verdict, must be taken as true, is, that as he approached the tracks certain freight cars were standing on the east or switch track next to the ice house within a few feet of the north sidewalk on Edwards Street. Appellant stopped his car before driving on to the east track, which was the sensible thing to do because if an engine had been attached to the cars on the side-track and had started to back them south while plaintiff was on that track, he would have had no possible chance to save himself. It is perhaps true that if he had driven

onto the switch track and had stopped his car within two or three feet of the rails on the second or main track, which he was obliged to cross, he might have had a view of the approaching train farther down the track than he had from the point at which he did stop. A reference to the plat introduced in evidence will disclose that there is only a space of eight feet between the rails on the switch track and on the main track, and with freight cars standing on the switch track extending on either side of the rails, and when it is considered that the front end of an automobile truck extends to a considerable distance in front of the seat occupied by the driver, it will be noted that appellant would have had to have the front end of his car approximately within striking distance of a passing train before he could see an approaching train on the main track.

While we do not contend that it was unlawful for the defendant to place box cars on the sidetrack either with or without an engine attached thereto, still, the cars were placed there by the defendant and could easily be seen by the engineer and fireman of the passenger train approaching from the north. The train crew were presumably as familiar with the crossing in question as was appellant and with the obstructions to the view of a driver who was proceeding west on Edwards Street. The train crew was also presumably familiar with the fact that the crossing flagman did not go on duty until seven o'clock A. M., and that there were no gates, bars, or warning devices of any kind installed at that crossing. The train crew were also familiar with the district in question and for the purpose of the motion for a di-

rected verdict it must be taken as true that no whistle or bell was sounded as the train approached the intersection.

People are only human beings after all, and the law only requires of people that they act with such care and caution for their own safety and for the safety of others as ordinarily reasonable and prudent people would exercise under the same or similar circumstances. This rule applies both to appellant and to the train crew of the defendant. In order to determine whether such care had been exercised by the parties to this suit, all of the facts and circumstances and all of the environment alleged in the declaration and testified to in behalf of appellant must be considered.

It is true that under the negligence counts in the declaration, appellant must establish by the greater weight of the evidence, not only negligence on the part of the defendant, but freedom from contributory negligence on his own part, before he would be entitled to recover damages.

Under the third count of the declaration which charges a willful and wanton injury inflicted by the defendant, there is no allegation, and it was not necessary to prove freedom from contributory negligence on the part of appellant. Appellee sought to eliminate the effect of the third count of the declaration by filing a third special plea (Tr. 22) alleging that the plaintiff willfully went upon said crossing without stopping, looking or listening for an approaching train at a place where he could see and hear an approaching train, and

without exercising any reasonable precaution to discover the approach of a train, and that such conduct was willful and wanton and contributed to the plaintiff's injuries. A demurrer was filed to this plea and a motion made to carry the demurrer back to the third count of the declaration, but the court sustained the demurrer to the plea and overruled the motion to carry the demurrer back to the declaration. (Tr. 25.) No cross error has been assigned and it therefore follows that the third count of the declaration states a cause of action, and if there be evidence in the record to sustain the allegations of that count, the court should not have directed a verdict, but the court should have required the defendant to put in its evidence.

The instant case is distinguishable from the *Goodman* and *Zayac* cases primarily for the reason that in neither of those cases did the automobile driver stop his car before attempting to pass over the railroad track. It is also distinguishable from those cases for the reason that the *Goodman* case was a country grade crossing case and the *Zayac* case occurred three blocks inside of the city limits in a village of some 6,000 people. The opinion in the *Zayac* case discloses that "the tracks were straight as far as the eye could see. There was nothing that obstructed the view for a long distance. We must hold that, within the standard of conduct laid down in the *Goodman* case, Zayac was guilty of contributory negligence."

In the instant case there was a large building built flush with the sidewalk which obstructed the view to the

north of a traveller going west on Edwards Street, and after passing the building a string of box cars on the east track, which had been placed there by the defendant, further obstructed the view. It will be also noted that neither the *Goodman* nor the *Zayac* case contains any willful count. In the *Zayac* case the Court of Appeals held that Zayac was guilty of contributory negligence which, of course, is a good defense to a negligence charge, but is not a defense where there is a willful count and where the evidence shows willful and wanton misconduct on the part of the one inflicting the injury. The trial judge held that the willful and wanton count stated a cause of action and also held that the plea of willful and wanton conduct on the part of the plaintiff did not constitute a legal defense to that count. *A fortiori*, no court that the writer knows of holds that contributory negligence is a defense to an injury willfully and wantonly inflicted.

It may be said that the trial judge held that he would have to disregard that count because there was no evidence of willfulness in this case. (Tr. 55.) In this holding we think the court committed error. The declaration in this case was based on and followed the declaration in the case of *Gerald Taylor, Admr.*, v. *Wheelock and Bierd, Receivers for C. & A. R. R. Co.*, 249 Ill. App. 51, which was a case tried on behalf of plaintiff by the writer of this brief, and which charged willful and wanton conduct on the part of the defendant. It is similar to the instant case in many of its features although the instant case appears to be a stronger case for the plaintiff than was the Taylor case for the reason that

the Wabash train ran into the automobile of the plaintiff (Tr. 35), whereas in the Taylor case decedent drove his automobile into the side of the rear end of the tender or front end of the baggage car after the engine had cleared the crossing. In the Taylor case, certiorari was denied by the Supreme Court, making the opinion of the appellate court final, a $10,000 verdict having been awarded in the court below.

While perhaps the statements of the trial judge in the instant case as to his reasons for directing a verdict for the defendant are not part of the record proper, it was thought only fair to set them forth in full in the transcript (Tr. 52-56). It will be noted that the trial judge quoted that part of the opinion in the *Goodman* case which holds that an automobile driver should get out of his car for the purpose of looking, if he cannot be sure otherwise, whether a train is dangerously near. It seems to counsel for appellant that it is incredible that the Supreme Court meant that statement to apply to drivers of vehicles in populous cities. It simply isn't done by anyone and it seems to be unreasonable to lay down a rule of conduct which probably not one person in a million would be expected to follow. On the other hand it seems unfair to hold that a railroad company may run its trains at a high and dangerous rate of speed through the business district of a populous city, across an intersection where it had placed freight cars which obstructed the view, where no watchman, gates or signal devices of any kind were maintained, and without giving the ordinary and reasonable warning of sounding a whistle or ringing a bell.

The principle announced in the *Goodman* case would be the same if the train in question had been running 75 miles an hour instead of 25 or 30. The pronouncement that trains must run upon rails, that when a man goes upon a railroad track he knows that he must stop for the train, not the train stop for him, is undoubtedly a wise pronouncement in the majority of cases where an accident occurs at a grade crossing, but to hold that a train crew may neglect all ordinary and reasonable precautions for the safety of persons lawfully crossing its tracks and that the railroad company may be absolved from the payment of damages in any event, simply because the train runs on rails and cannot turn out, or cannot stop or start quickly, seems to be carrying the doctrine announced in the *Goodman* case too far. It is not thought possible that the Supreme Court meant to lay down a rule of conduct which absolutely relieves every railroad in the country from paying damages in any event when any person shall be struck at any grade crossing, whether in the country or in the city. If so the railroads might as well do away with bells, whistles, gates, flagmen, warning devices, or anything else that is maintained to contribute to the safety of persons crossing railroad tracks at a highway or public intersection. It seems to counsel for appellant that the rule of conduct laid down in the *Goodman* case should be modified to meet the exigency of this and similar cases.

In *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, decedent was killed at a grade crossing in the City of Detroit resulting in a verdict for the plaintiff adminis-

trator, which was affirmed by the Supreme Court. The environment was set forth, alleging, among other things, obstructions to the view of persons about to cross the tracks, said obstructions consisting of houses, barn and outbuildings, shrubbery, an orchard, trees, etc., so that a traveller could not see an approaching train until within fifteen or twenty feet of the track. It also appeared from the evidence that no watchman was stationed at the crossing in question. The Supreme Court held that the trial court erred in refusing to give an instruction asked in behalf of plaintiff calling attention to the circumstances surrounding the crossing in question, and authorizing the jury to find that a duty may exist to provide a flagman or gates or other warnings or appliances, if the situation of the crossing reasonably requires that, aside from any statutory requirement. In discussing the refusal to give the requested instruction, the court quotes with approval from a case in which it is said:

> "The doctrine with reference to those crossing the track of a railway, where the right to cross exists, is, that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at a crossing in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts in each case. At a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day."

In *Norfolk & W. Ry. Co. v. Holbrook*, 27 Fed. (2nd) 326, a case very similar to the instant case was under consideration by the court of the sixth circuit. While the pleadings are not set forth in the opinion, the evidence discloses that a man was injured at a grade crossing and his wife and child, who were riding with him, were killed. The three cases were tried together, verdicts returned for plaintiff in each case and the verdicts sustained by the Court of Appeals.

In the opinion of counsel for petitioner the opinion in the *Goodman* case should be modified so as to not require persons about to cross railroad tracks in populous cities to get out of their cars and walk ahead for the purpose of obtaining an unobstructed view of the track, and the apparent right granted the railroad companies to operate trains at unlimited speed over grade crossings through populous cities without taking any ordinary or reasonable precaution to prevent injury to travellers lawfully crossing their track, should be curtailed.

Respectfully submitted,

CHARLES S. ANDRUS,
WM. ST. J. WINES,
Counsel for Petitioner.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in affirming the decision of the United States District Court.

The Circuit Court of Appeals erred in refusing to reverse and remand the case for submission to a jury.

CHARLES S. ANDRUS,
WM. ST. JOHN WINES,
Counsel for Petitioner.

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DEC 9 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 585

JOHN POKORA,

Petitioner,

vs.

THE WABASH RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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I.

STATEMENT OF THE CASE.

A concise and accurate statement of the case appears in the opinion of the Circuit Court of Appeals (Trans., 68-70). (66 F. (2nd) 166)

We will add to that statement of fact that Petitioner did not see the train in question.

Petitioner's evidence as to this fact is as follows:

> "I saw nothing and that is all I know (Trans., 29). I don't know what hit me even (Trans., 30). I did not see the train at all. The next thing I know I was in the hospital. I have never seen the train. I don't know what hit me (Trans., 33)."

ARGUMENT.

Summary of the Argument.

Point A. The document purported to be a "Petition for a Writ of Certiorari and Brief of Petitioner in support thereof" served upon Respondent, does not contain a Petition for the Writ.

Point B. The purported Petition and Brief of Petitioner do not comply with the rules of this Court.

Point C. The Decision and Judgment of the Circuit Court of Appeals is in strict conformity with the decision of this Court in *Baltimore and Ohio Railroad Company* v. *Goodman*, 275 U. S. 66.

Point D. There is no substantial evidence supporting the charge of willfulness.

Point A.

This point requires no elaboration. There is no Petition for a Writ of Certiorari, nor any prayer therefor and there is nothing upon which this Court should act. The only semblance to a prayer is found in the last paragraph of the argument on page 28 of Petitioner's Brief wherein counsel for Petitioner says:

> "In the opinion of Counsel for Petitioner the opinion in the Goodman case should be modified * * *."

Point B.

The purported Petition does not comply with Rule 38 of this Court.

1.

It does not "contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ".

2.

The Brief is not direct and concise and in conformity with Rule 27.

3.

The purported Petition and Brief do not set forth any special or important reasons for the granting of the Writ of Certiorari as required by Paragraph 5 of Rule 38 of this Court.

This case grows out of an ordinary grade crossing accident where the view of the traveler on the highway was obstructed.

The purported Petition and Brief of Petitioner consists almost entirely of a reprint of Brief of Petitioner filed in the Circuit Court of Appeals for the Seventh Circuit, setting forth in detail the pleadings and the evidence of all the witnesses.

POINT C.

The Circuit Court of Appeals for the Seventh Circuit based its decision squarely upon the doctrine announced by this Court in *Baltimore and Ohio Railroad Company* v. *Goodman*, 275 U. S. 66.

Petitioner does not point out wherein said decision is in conflict with that of any other Circuit Court of Appeals nor in conflict with the decision of this Court.

Petitioner devotes a large portion of his brief to a discussion of the negligence of Respondent which is not the question involved in this application. The sole question is the standard of care applicable to Petitioner. True, there are some reported cases wherein Circuit Courts of Appeal have distinguished the cases under consideration from the Goodman case.

No case is reported wherein a plaintiff has sustained a recovery when he was familiar with the crossing and the movement of the train involved, when it was broad daylight, when he stopped where his view was obstructed, when his hearing was interfered with by his own motor and other distracting noises, when he knew that there was no crossing watchman on duty at the time and where he could by taking other ordinary precautions, have avoided the accident.

Petitioner cites as on all fours, the case of *Teague* v. *St. Louis S. Western Ry. Co.* 36 F. (2nd) 217 (Petitioner's Brief, page 16).

We will discuss this case as a sample:

1.

The negligence charged was the failure to maintain a proper warning of the approaching train, whereas in the case at Bar the negligence charged was in the operation of the train.

2.

Plaintiff was not familiar with the crossing. In the case at Bar, Plaintiff was familiar with both the crossing and movement of train.

3.

Electric gong across the track was silent and Plaintiff relied on it as indicating that no train was dangerously near.

4.

Electric gong had been out of repair for three weeks but no notice was posted of its condition.

In the case at Bar a plat showing the entire situation was introduced in evidence but was not embodied in the Bill of Exceptions.

By consent of counsel this plat was submitted to the Circuit Court of Appeals but it is not in the record submitted to this Court.

In his brief (page 20) counsel for Petitioner says that before this suit was brought he was familiar with the holdings in the Goodman case (275 U. S. 66) and the Zayac case (30 F. (2nd) 764).

No doubt that was the reason that the suit was instituted in the State Court rather than the Federal Court.

POINT D.

While the Trial Court held that the willful count stated a good cause of action, both the Trial Court and the Circuit Court of Appeals found no substantial evidence to support such a charge.

Petitioner in his Brief Points VIII, IX, X and XI, pp. 16-18, cites cases mostly from Illinois, but he cites no case from any Federal Jurisdiction to sustain a charge of willfulness as construed by the Federal Courts.

IT IS THEREFORE RESPECTFULLY SUBMITTED that this case is not a proper one for review by Certiorari in this Court, and that the purported Petition for a Writ of Certiorari should be denied.

DATED December 7, 1933.

WALTER MC C ALLEN,
Counsel for Respondent.
N. S. BROWN,
HENRY A. CONVERSE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

No. 585.

JOHN POKORA, Petitioner,

vs.

THE WABASH RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES.

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT.

STATEMENT OF CASE.

The Circuit Court of Appeals made a concise statement of the salient facts of this case and we take the liberty of setting forth that statement here.

"By this action appellant (petitioner) seeks to recover damages alleged to have been sustained by him as a result of being struck by appellee's (respondent's) railway train at a grade crossing in Springfield, Illinois. The first count

of the declaration contained a general charge of negligence; the second count described the environment in detail and alleged special negligence on the part of appellee, in that it placed certain freight cars on a switch track in close proximity to the intersection in question and that it had operated its train toward the intersection at a high and dangerous rate of speed; the third count charged a willful and wanton injury, again describing the environment with particularity. At the conclusion of appellant's evidence the Court instructed the jury to find for appellee, which it did, and judgment was thereupon entered for appellee for costs.

"Viewed in the light most favorable to appellant, the evidence submitted supports the following facts: Tenth street in the City of Springfield runs north and south. It is intersected by Edwards street, which runs east and west, and at this point the accident happened. Appellee's railway tracks and station are located on Tenth street, and the station is five city blocks due north of Edwards street. At the intersection referred to appellee has four tracks. East of and parallel with the main track is one switch track and on the west of the main track there are two switches. On the northeast corner of the intersection of the streets there is located an ice plant. Its main building is flush with the west and south property lines and has a frontage of about eighty feet on Edwards street. The west property line of the ice company is parallel with the railroad tracks and is seventeen and a half feet east of

the east rail of the east switch and thirty and a half feet east of the east rail of the main track. Thirty feet east of the main building, and seven and a half feet north of its south line, is located the ice company's service station, which has a frontage of thirty feet on Edwards street. Fifteen feet east of the service station is a public alley, running north and south. Edwards street is eighty feet in width between property lines. The traveled portion is thirty feet in width and is paved with brick to the extended west property line of the ice company, and with macadam from that point to the first railroad track. The north line of the pavement is twenty-five feet south of the south property line of the ice company, and thirty-two feet south of the loading platform of the ice service station. At the intersection of the paved portion of Edwards street and the alley, which is about 175 feet east of the first railroad track, a driveway runs northwestwardly to the service station, and returns southwestwardly to the paved portion of Edwards street at about ninety feet east of the first track.

"Appellant was engaged in the grocery and retail ice business and purchased his ice from the company referred to. On the morning of August 17, 1929, he left his home at 5:45 a. m., when it was daylight, and with his automobile truck drove to the ice plant for the purpose of securing ice. He decided to go across the tracks to another plant of the same company which was located at the southwest corner of Edwards and Tenth streets. A string of

box cars was standing on the east switch track at a point from forty-two to forty-eight feet north of the center of Edwards street. At that time the scoring machine, composed of eight saws (used for sawing ice), was running and caused a loud singing noise which could be heard for the distance of a city block. Before entering upon the tracks appellant stopped his truck at a point from ten to fifteen feet east of the east switch. He remained in the truck and, without stopping his engine, looked north and south and listened for trains. Not hearing or seeing any, he drove across the switch track and upon the main track and was there struck by a southbound passenger train, which had stopped at the station, and was then traveling at an estimated speed of from twenty-five to thirty miles per hour without sounding the bell or whistle. Appellant's witnesses are not in accord as to the location of the rear end of the train when it stopped. They place it at different points from barely south of Edwards street to 150 feet below that point.

"Appellant had been in the habit of getting ice from both ice houses for the past ten years and was fully acquainted with the surroundings. He usually went any time from 6 to 7:30 o'clock in the morning, and had crossed the tracks at that point for the purpose of getting a quicker delivery of ice very frequently. He knew that there was an early morning southbound train and had seen it pass that place on many other days. On the morning of the accident no one was in front of him at the crossing; the watchman was

not there, and appellant knew that he did not come on duty until 7 o'clock."

To this statement we add that the petitioner did not see the train at any time, was in a hurry and had crossed the particular crossing hundreds of times; that there was much noise and confusion, due to the presence of numerous trucks being loaded with ice just east of the place petitioner stopped, and that in the highway, in close proximity to petitioner, whose motor was running, there was a model T Ford with its noisy motor also running.

The statement in the petition for the writ, on page 9, contains the following:

> "He (Otto Goetz) stated that Pokora had previously stopped at his ice house for ice, but the witness waved him on across the tracks, as that platform was crowded."

This is not supported by any evidence in the record, and such statement by counsel might be construed as indicating that Goetz gave the petitioner some assurance of safety.

The testimony of Goetz (R. 39) is as follows:

> "Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes until all the drivers were loaded out."

PROPOSITIONS OF LAW RELIED ON, WITH CITATION OF AUTHORITIES IN SUPPORT OF EACH.

I.

The question of due care very generally is left to the jury, but when dealing with a standard of conduct, and that standard is clear, it should be laid down by the Court.

Baltimore & Ohio Railroad Company v. Goodman, 275 U. S. 66.

II.

One attempting to drive an automobile over a railroad crossing with which he is familiar is negligent so as to prevent recovery for injury to himself and damage to his automobile by being struck by a train where, when his view of the track is obstructed, he does not stop, look and listen, where looking and listening would be effective, and if necessary leave the vehicle to make sure the crossing is safe.

Baltimore & Ohio Railroad Co. v. Goodman, 275 U. S. 66;

Sertich v. Baltimore & Ohio R. Co., 29 Fed. (2d) 112;

Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10 (7th Circuit);

Wabash Ry. Co. v. Zayac (7th Circuit), 30 Fed. (2d) 764;
Flack v. D. L. & W. R. Co., 45 Fed. (2d) 683;
Kilmer v. Norfolk & W. Ry. Co., 45 Fed. (2d) 532;
Reynolds v. Atlantic Coast Line, 44 Fed. (2d) 338;
Rogers v. C. R. I. & P. Ry. Co., 39 Fed. (2d) 601;
Lang v. Byram, 35 Fed. (2d) 489;
Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410;
Blunt v. Chicago, M. & St. P. Ry. Co., 34 Fed. (2d) 63 (No. Dist. of Illinois);
Conrad v. Wheelock et al., 24 Fed. (2d) 996 (So. Dist. of Illinois);
Kutchma v. Atchison, T. & S. F. R. Co., 23 Fed. (2d) 183;
Leiby v. Pennsylvania R. Co., 58 Fed. (2d) 970;
Walton v. Oregon Short Line, 50 Fed. (2d) 352;
Southern Pacific Co. v. Day, 38 Fed. (2d) 958.

III.

To listen only when one cannot hear an approaching train because other noises obstruct the sense of hearing and to look only where the view of approaching trains is obstructed, is as careless and negligent of duty as not to look for and listen at all.

Kutchma v. Atchison, T. & S. F. R. Co., 23 Fed. (2d) 183;
Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410.

IV.

The cases distinguishing or thought not to follow Baltimore & Ohio R. Co. v. Goodman (276 U. S. 66), are where the driver of the automobile did all that a reasonable man could do and had his sight and hearing interfered with by darkness, fog or the like or where he was lulled into acting as he did by some act or invitation of the railroad.

Kilmer v. Norfolk & W. R. Co., 45 Fed. (2d) 532 (dissenting opinion);
Weinstein v. Powell, 61 Fed. (2d) 411;
Norfolk & W. Ry. Co. v. Holbrook, 27 Fed. (2d) 327.

V.

Where evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in the federal courts.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 343;
Herron v. Southern Pacific Co., 283 U. S. 91, 95;
Gunning v. Cooley, 281 U. S. 90, 94;

Small Company v. Lamborn Co., 267 U. S. 248;
Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10.

VI.

When the question is one of general law and there is no governing statute nor local rule of property involved, the federal court will exercise its own judgment uncontrolled by the decisions of the courts of the several states.

Herron v. Southern Pacific Co., 283 U. S. 91;
Lake Shore etc. R. Co. v. Prentice, 147 U. S. 101, 106;
25 Corpus Juris 846, Sec. 185.

VII.

In order to establish a charge of willfulness in the federal courts, the engineer operating the locomotive must have seen or known of the impending danger of the plaintiff and then failed to exercise ordinary care to avoid the injury or must have failed to discover the danger through recklessness or carelessness, when it could have been discovered by the exercise of ordinary care.

Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10;
Conrad v. Wheelock et al., 24 Fed. (2d) 996 (So. Dist. of Illinois);
Blunt v. Chicago, M. & St. P. R. Co., 34 Fed. (2d) 63 (No. Dist. of Illinois).

VIII.

In the federal courts the rule of the last clear chance, which in effect is willfulness, is that there must appear subsequent negligence on the part of the defendant after actual discovery of plaintiff's peril.

Kansas City Southern Ry. Co. v. Ellzey, 275 U. S. 236, 241;
Walker v. E. St. L. & S. Ry. Co., 25 Fed. (2d) 579;
Wheelock v. Clay, 13 Fed. (2d) 972;
Kinney v. Chicago G. W. Ry. Co., 17 Fed. (2d) 708;
Penn. R. Co. v. Swartzel, 17 Fed. (2d) 869.

SUMMARY OF THE ARGUMENT.

The evidence viewed in the light most favorable to petitioner shows that petitioner was guilty of contributory negligence.

The standard of care laid down in Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66, should not be modified, but should be applied in this case.

There is no evidence to support the charge of willfulness.

ARGUMENT.

This case rests upon the testimony introduced by the petitioner, viewed most favorably in his behalf.

While we do not intend to argue the question of the negligence of the respondent, we call attention to the fact that there is no evidence as to the speed of the train at the time of the accident, as the only witness testifying as to the speed saw it only as it passed the door of his office two blocks north of the crossing (R. 48, 49); and that the evidence as to sounding of the bell and whistle is of a negative character, as the witnesses who testified on this question were remote from the scene, or were paying no attention, or were engaged in their own personal activities, or were subjected to the distracting noises of motors of trucks or other automobiles, and the singing noise of the ice saws, which could be heard a block away (R. 40), or the noise and confusion of trucks being loaded with ice at the ice factory, which conditions surrounded and applied to the petitioner and go to establish his contributory negligence.

In its opinion the Circuit Court of Appeals describes with particularity the location of the crossing, the buildings, the tracks and other things, giving with exactness the property lines and distances between tracks, describing the paved portion of the highway and the distances that petitioner could have seen along the main track to the north.

The petition for the writ of certiorari (p. 6) contains the following:

> "To sustain the charges contained in the declaration of the plaintiff fifteen witnesses were introduced. Wade Seeley (Tr. 29), a civil engineer and surveyor for the past twenty-seven years, identified a plat made by him of the intersection in question, showing in detail the location of the tracks, width of the streets, location of the buildings, obstructions to the view of persons traveling west on Edwards street, and various measurements appearing on the plat. This plat was introduced without objection and is most important in the opinion of counsel for the plaintiff. Attention will be called to it later in the argument."

The record shows that on the trial of the cause the petitioner introduced in evidence a plat of the intersection of Tenth and Edwards streets, made by a civil engineer and surveyor, who testified that the location of buildings and the measurements indicated on the plat were true and correct. The plat was exhibited to the jury (R. 29), and was shown to three of petitioner's witnesses, and their testimony had direct reference to it (R. 39, 46, 50).

The plat was not incorporated in the transcript on appeal in the Circuit Court of Appeals, and is not in the record in this court. It may be assumed that facts shown on the plat were considered by the Circuit Court of Appeals, because the plat was before the Court on oral argument and the majority opinion makes reference to specific locations and distances not shown in the testimony of

witnesses (R. 69, 70, 72). In the dissenting opinion it is said, "Two witnesses testified there were box cars on each of the two east tracks, but in view of the plat, which appellant offered in evidence, this is probably an error" (R. 72). The plat, however, is not a part of the record in the case. When this important portion of the evidence, which was offered on the trial, referred to by the witnesses in connection with their testimony, considered by the trial court in ruling that the petitioner had not made a case for the jury, and evidently considered by the Circuit Court of Appeals in deciding that the lower court ruled correctly, has been wholly omitted from the record in the case, will the lower court be convicted of error and its judgment be reversed by this Court, when it has not before it the evidence upon which the lower court based its ruling?

The Established Evidentiary Facts Show Petitioner's Contributory Negligence.

The respondent believes that the evidence in this case shows conclusively that the petitioner was guilty of contributory negligence, and that a recital of the facts will lead to the conclusion that the ruling of the trial court and the decision of the Circuit Court of Appeals were correct and should be affirmed.

The undisputed facts are as follows:

1. The accident happened in broad daylight.

2. The petitioner was familiar with the crossing and the surroundings and he had passed over the crossing hundreds of times (R. 31, 32).

3. The petitioner knew that a southbound passenger train passed the crossing about the hour of the accident, that there were no gates or bars at the crossing, that no crossing watchman was on duty at that hour, and that sometimes the train did not whistle (R. 31, 32, 33).

4. The petitioner stopped his automobile twenty-eight feet east of the main track and ten or fifteen feet east of the switch track, where he could see somewhat to the north of the south end of a box car which was standing on the switch track forty-two to forty-eight feet north of the center line of Edwards street, in which he was traveling westward, and petitioner's view rapidly increased northwardly as he traveled west, and when eight feet from the main track his view of that track northward was unobstructed (R. 32, and Opinion of Circuit Court of Appeals, R. 68, 69, 70, 72).

5. The petitioner stopped at a point where he knew his view northward along the main track was obstructed by a box car standing on the switch track north of the street and east of the main track (R. 32).

6. The petitioner was in a hurry and did not stop the motor of his truck (R. 31, 32). He knew there were numerous other trucks in the immediate vicinity east of him being loaded with ice, that the motor of a noisy Model T

Ford was running immediately back of him and that the machinery at the ice plant just east of where he stopped was making a noise which could be heard a block away (R. 29, 38; 39, 40).

8. The petitioner did not alight from his truck or make any effort to learn whether a train was approaching, except to look and listen when ten or fifteen feet east of the switch track, although he knew the box car on the switch track obstructed his view, and that the noises of automobiles and the ice factory immediately east of where he stopped would interfere with his hearing a train (R. 29, 31, 32, 40).

9. The petitioner ran his truck westward along the north side of the street and close to the box car on the switch track where his view to the north was most obstructed, when by driving near the center of the street at a distance of forty-two to forty-eight feet south of the box car he would have had a much farther and rapidly extending view northward along the main track as the freight car on the switch track was six, eight or ten feet north of the sidewalk (R. 32, 35, 46, and Petition for Writ, p. 7).

10. The petitioner was not signaled by anyone to cross the track and no one went across immediately in front of him (R. 33). The petitioner erroneously stated in his petition for the writ that Goetz, an employe at the ice factory, "waved him on across the tracks" (Petition for Writ,

p. 9). The witness testified that the drivers were so crowded at the loading platform that he waved petitioner up and told him he would have to wait about twenty minutes until all the drivers were loaded out (R. 39).

11. The petitioner did not stop or look again to the north as he approached the main track, when by so doing he could have increased his view to the north, but he looked straight west and drove onto the track without seeing the train and without knowing what struck him (R. 32, 33).

The rule stated in Baltimore & Ohio v. Goodman, 275 U. S., l. c. 70, is directly applicable here. The Court said:

> "It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If, at the last moment, Goodman found himself in an emergency, it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and, when the standard is clear, it should be laid down once for all by the courts."

In Herron v. Southern Pacific Co., 283 U. S. 91, at page 95, the Court said:

> "Where, in an action in a federal court to recover damages for personal injuries, contributory negli-

gence or assumption of risk constitutes a defense, and, by reason of the facts being undisputed and of the absence of conflicting inferences, the evidence of contributory negligence or assumption of risk is conclusive and the question is one of law, the Judge has the right and duty to direct a verdict for defendant" (citing cases, including Baltimore & Ohio R. Co. v. Goodman, 275 U. S. 66, 69, 70).

The Court has never modified, varied from or cast any doubt upon the standard of conduct so definitely and clearly stated in the Goodman case. The facts in this case are not identical in every detail with the facts in the Goodman case, but respondent believes that in every essential particular the negligence of the petitioner is as fully and fairly established as was the negligence of the deceased automobile driver in the Goodman case, and that the same decision should be reached in this case as in that one.

The Rule Announced in Baltimore & Ohio Railroad Co. v. Goodman, 275 U. S. 66, Should Not Be Modified.

Counsel for petitioner does not question the soundness of the ruling in the Goodman case, but limits his argument to a suggestion that it be modified in this case and in other cases where an accident happens at a grade crossing in a populous city (Brief of petitioner in support of petition for writ, p. 28).

His particular criticism of the Goodman case is based upon his assumed conclusion that it lays down the requirement that the driver of an automobile must always alight from his car and go forward and get an unobstructed view of the track.

We do not assume to tell the Court what it meant by the language used in the Goodman case, but it seems certain that no such requirement is stated in it.

The Goodman case was decided October 31, 1927, and has been followed by Circuit Courts of Appeals and District Courts in many cases, and we do not find a reported case making the distinction sought by counsel for petitioner.

The Circuit Court of Appeals in this case gave this argument, advanced by petitioner, serious consideration and decided (R. 71) as follows:

> "* * * We are unable to understand why the rule there laid down does not apply to a crossing in a city as well as in the country; if it were otherwise a traveler would be required to exercise more care in crossing a railroad track in the country where his vision was less obstructed than in a congested city where it is more restricted."

Every court in the land holds that a railroad crossing is a place of known danger; that the train cannot stop for the highway traveler nor turn out for him; that it is the duty of the traveler on the highway to stop for the train

and not the train to stop for him. It is common knowledge that an automobile may be brought to a stop from a high speed in a very few feet, while the time and distance in which a train may be stopped are much greater.

All courts agree that it is an idle gesture for the traveler to look where he cannot see or to listen when distracting noises prevent him from hearing. But that is exactly what the petitioner did in this case, as the undisputed evidence clearly shows.

The language in the Goodman case is clear, concise and unequivocal.

The admonition that the driver of the automobile should get out and go forward is limited (275 U. S., loc. cit. 69) to those rare cases where,

> "* * * if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

But the standard of care laid down in the Goodman case does not require that the driver alight in all cases where the view is obstructed, but in such cases the driver must take some other reasonable precautions. This Court further said:

> "It seems to us that if he relies upon not hearing the train or any signal and takes no further precautions he does so at his own risk."

In the case at bar the Circuit Court of Appeals did not base its decision upon the failure of petitioner to get out of his truck, but it did hold that he stopped at a point where his view of the track was limited, and his hearing was interfered with by distracting noises, and that he could have approached the track near enough to get a clear view or at least a better and sufficient view, and, therefore,

> "* * * it was his duty, under the authority of the Goodman case, to take further precautions."

The petitioner testified that he did not see the train at any time and that after he started his truck he only looked straight west, therefore he did not look where and when his view was unobstructed, as he could have done, but he went upon the track relying solely upon his hearing. It is evident that he did not look after he got to a place where he could see, which was a safe distance from the main track, for the train was then in plain view, and he said he did not see it. The only precaution he took in his hurry was to stop (leaving his engine running) and rely solely upon his hearing, at a point where he knew he could not see.

It may be asked, what other precautions could he have taken?

Bearing in mind that he knew he was about to enter a zone of imminent danger, he could have alighted from

his truck and looked northward, or he could have asked one of the automobile drivers a few feet behind him to flag the crossing for him, or he could have stopped in safety nearer the tracks and obtained an unobstructed view north of the crossing. If he had taken the time and precaution to stop his own motor that small interim of time might have saved him from the collision. The interim of time between safety and peril was but a fraction of a second.

The trial judge, Honorable Louis FitzHenry, now on the Circuit Court of Appeals for the Seventh Circuit, had the rule in the Goodman case before him in the case of Conrad v. Wheelock, 24 F. (2d) 996.

In that case the Court said:

> "I do not understand that the Supreme Court of the United States laid down any new rules in the Goodman case. It does not reverse, or modify, or change, in any respect, the substantial rules in negligence cases of the character there disposed of by the Court.
>
> "But it does this: It admonishes the Circuit Courts of Appeal and the United States District Court that it is their duty to apply the law in cases of this character.
>
> "It has long been the law that when a person goes into a place of danger, known by him to be a dangerous place, he must exercise care for his own safety commensurate with the dangers and incidental perils he encounters in entering the place; he must exercise that degree of care which an ordinarily prudent person would exercise under like circumstances.

"A railroad crossing, even in the great open spaces, is a dangerous place; where it crosses one of the main highways or streets of a city or village is a dangerous place."

This Court granted the writ of certiorari in the Goodman case to bring up the case from the Sixth Circuit because of the conflicting decisions in grade crossing cases in the various circuits.

In Baltimore & Ohio R. Co. v. Shaw, 35 F. (2d) 410, Judge Buffington reviewed the conflicting decisions in the United States courts in cases involving automobile accidents at railroad crossings.

He pointed out the view taken by the Circuit Court of Appeals of the Third Circuit twenty years previous upon the advent of the automobile as an active agent of transportation on the highway, and that this Court, in the Goodman case, had affirmed the views of the Third and Eighth Circuits. In that opinion the Court said:

"Now, while no absolute rule of conduct can be laid down, because necessarily each case stands on its own facts, the general principle is that where an automobile driver, in attempting a passage takes, as was there said, chance instead of precaution, and makes chance, not sight, the guarantee of his safety, he is not taking due care, and lack of due care which brings about an ensuing accident is contributory negligence."

As Judge Buffington pointed out, twenty years before the decision in the Goodman case, the Circuit Court of Appeals for the Third Circuit called attention to the fact that an automobile coming into collision with a railroad train was a menace to the train and its crews and passengers.

It is nothing new for a court to lay down a positive standard of care. For many years it has been a positive rule in many state courts that the traveler upon the highway must stop, look and listen before attempting to cross a railroad at grade, and where such failure is established as a fact, recovery in those states is denied as a matter of law.

Counsel for petitioner asserts that drivers of automobiles in populous cities do not alight and go forward and that such a requirement is unreasonable.

Since counsel makes such a positive assertion, we feel that we are justified in stating that it is a matter of common observation that motorbus companies require their operators, even where there is only one man in charge of the bus, to alight and go forward and get a clear view of the railroad track before attempting to cross a railroad at grade.

In the dissenting opinion in the case at bar the learned Judge cited cases wherein the Goodman case was distinguished.

We will not lengthen this brief by a discussion of those cases, but call attention to the fact that in those cases,

upon the evidence in each case, the Court found a distinction, but in no case is the rule in the Goodman case questioned nor do any of those cases disclose a situation similar to that in the case at bar, and none of them would be authority for making any such distinction in this case.

The dissenting opinion lays great stress upon the fact that there were box cars standing upon the last switch track. The Judge dissenting said:

> "Had appellant gone forward upon the switch track before stopping to look and listen he would have encountered the new danger of possible movement of the string of box cars" (R. 73).

The learned dissenting Judge clearly indulges in conjecture and speculation as to the danger of the cars on the switch track being moved. There is nothing in the record to warrant such speculation. The petitioner did not testify that he had any fear that those cars would be moved over the crossing, and there is no testimony tending in any way to show any movement of those cars. One witness testified: "There are always box cars or freight cars standing on the east track there on the north side of Edwards street" (R. 51). There is positive evidence that the petitioner knew that the train which struck him was due to pass over the main track at about that time. It seems illogical to hold that petitioner was justified in driving onto the main track without looking when he knew there was a train likely to pass on that track, and should

be excused for not stopping on the switch track because of an assumed possibility that the cars on that track might be moved, when he had stopped just east of that track and saw that there was no locomotive attached to those cars and he had no reason to expect that the cars on that track would be moved.

We must bear in mind that this was a warehouse district, that box cars on sidetracks were of necessity placed for the business purposes of the public, and counsel for petitioner admits that such placing of box cars upon sidetracks of the railroad was not negligence, although he so charges in his declaration.

If the presence of the box cars created an additional danger, then it was the duty of petitioner to take precautions commensurate with this danger. When he stopped ten or fifteen feet east of the switch he could see that there was no locomotive attached to the box cars upon the switch track, and, having seen there was no danger of the cars on the switch track being moved, it was his duty to go upon the switch track and stop where he would have been able to get a view of the main track.

The dissenting opinion, in apprehending danger from the presence of the box cars on the sidetrack, would place plaintiff in position of hazard that is not shown to exist.

Petitioner's contributory negligence is clearly established, and this case might well be decided upon but one portion of petitioner's testimony:

> "I saw nothing, and that is all I know (R. 29); I don't know what hit me even (R. 30). I was going along the north side of Edwards street, near the north curb, and was looking straight west (R. 32). I did not see the train at all. The next thing I know I was in the hospital. I have never seen the train. I don't know what hit me" (R. 33).

We respectfully submit that this testimony alone should end petitioner's case. It is inconceivable that petitioner could have gotten on the track and been hit by the train and not see the train, if he was looking. His evidence shows conclusively that he did not look at a place where he could see, for he says he looked straight west, instead of north, the direction from which he knew the train came. This alone establishes a clear case of contributory negligence.

Further, petitioner was in a hurry, stopped about twenty-eight feet from the main track at a place where his view was almost wholly obstructed, let his engine continue running, and did not alight from his truck and go forward, or stop or look nearer the track. He knew there was no watchman at the crossing and was not induced by the railroad company, by any act of commission or omission, to attempt to cross. He was familiar with the crossing, had crossed it hundreds of times and knew that the passenger train in question was due at about that time.

The trial court was of the opinion, after hearing the evidence, that it could not let a verdict for the plaintiff

stand, if the jury should return one, and it was therefore its duty to direct a verdict for the defendant.

It seems to us that this case falls clearly within the rule in the Goodman case, for the evidence discloses that the petitioner stopped where he could not see, and listened at a time when, and place where, he could not hear, and without taking any further precautions proceeded to go upon the crossing, where he was struck by the oncoming train, and the Court performed its judicial duty by directing a verdict. We cannot see why, under such circumstances, the Court should submit to the jury the question whether plaintiff was exercising such reasonable care for his safety as a reasonably prudent person would exercise under the same or similar circumstances. In such a case the stopping to look where the driver cannot see and listening where he cannot hear cannot be considered as reasonable and prudent conduct when the driver knows that he is dealing with a question of life or death for himself and others, and when, as the record shows, he could have taken further precautions which would have enabled him to see the train and avoid injury.

He wholly failed to exercise the standard of care laid down in the Goodman case. The trial court (R. 55, 56) and the Circuit Court of Appeals (R. 70, 71) quoted the material portions of that opinion and rightly relied upon that decision.

The lower courts (R. 53, 70) referred to the case of Wabash v. Zayac, 30 Fed. (2d) 764. Counsel for petitioner

seeks to distinguish this case from both the Goodman and Zayac cases (Petitioner's Brief, pp. 18-23) on the ground that in both of those cases the drivers of the auto failed to stop before attempting to cross the tracks.

True, Goodman did fail to stop, but slowed down to five miles an hour, but Zayac did come to a full stop.

We quote from the opinion in the Zayac case, 30 Fed. (2d), at page 765:

> "One witness two or three hundred feet from the crossing saw the automobile, headed west, with people in it, stop at the crossing. Another, three hundred feet south of the crossing, saw people in both seats of the automobile as it stopped ten or fifteen feet from the north track."

Counsel for petitioner urges that the rule in the Goodman case should not apply in populous cities. Under our Propositions of Law II we have cited many cases in the various federal circuits following the Goodman rule, but we fail to find any making the distinction urged by counsel for petitioner.

The location of the crossing may have a direct bearing upon the negligence of the railroad, but a grade crossing is a place where trains run, no matter where located, and whether or not the given case may involve negligence of the railroad, the driver of the automobile is held to the same standard of care when he goes into such a place of known danger.

Under our Proposition IV are cited some of the cases distinguishing the rule in the Goodman case. We have found no case that relieves a plaintiff who attempts to cross a railroad at grade, with which he is familiar, in broad daylight, when he knows it is the usual time for a train, and knows there are no gates, and no watchman on duty at the time, and stops to look and listen at a place where he cannot see and where there are distracting noises and activities, when he could have made sure by alighting or by driving near to the center of the street instead of close to the freight car on the switch track, or by stopping eight or ten feet from the main track where he could have seen for a long distance down a straight track, or where he could have taken other precautions. The duty is the same in all cases, whether the location is in the open country, village, hamlet or populous city.

Petitioner's testimony establishes beyond all question that he stopped and looked at a place where he could not see or hear, and that he neither stopped nor looked at a place where he could have seen the train. The noise and rumble of the train was heard by one witness who was a block away (R. 37), and by another witness who was one hundred and fifty feet west of the railroad (R. 45, 46, 48). The noise at the ice factory was so great that the witness Goetz did not even hear the crash when the engine struck the truck (R. 39, 40). It was under those conditions that petitioner listened for the train.

The Court in Garrett v. Pennsylvania Railroad Co., 47 Fed. (2d) 10, at page 12, says:

> "A traveler approaching a railroad crossing must look and listen at places and at times where and when his senses give notice of approaching trains."

To the same effect are:

Kutchma v. Atchison, T. & S. F. Ry. Co., 23 Fed. (2d) 183;
Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410.

A case so nearly on all fours that we need only change the names of the parties is Sertich v. Baltimore & O. R. Co., 29 Fed. (2d) 112. The material portion of the opinion is as follows:

> "Plaintiff was thoroughly familiar with the crossing where he was injured. When he drove upon it he knew that the fast train that struck him was due. Notwithstanding this, he drove his heavily overloaded truck onto the crossing behind box cars which stood on a spur track and which shut off his view in the direction from which the train was approaching. He took no precaution other than to stop just before reaching the box cars and listen for the train with the noisy motor of his truck still running. Not hearing the train he proceeded, although he knew or should have known that if it was approaching he would be in the danger zone before he could see it. He voluntarily took the chance which the situation involved

and, under the doctrine of the Goodman case, he cannot recover."

We do not desire unnecessarily to lengthen this brief by discussing other cases cited under our proposition II, but believe they all sustain the action of the trial court and Circuit Court of Appeals in this case.

However, Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410, gives an interesting discussion of the development of the law relative to automobile grade crossing accidents. That case is very persuasive in this case because there the declaration set up in detail the dangerous environment. Further, there was a crossing watchman on duty, whose back was turned. The plaintiff came from behind a shanty house at the corner of the crossing, so that his automobile was within three feet of the track upon which the train was coming before he could see down the track. The Goodman rule was applied and plaintiff was denied the right to recover.

Counsel for petitioner relies upon the case of Norfolk & W. Ry. Co. v. Holbrook, 27 Fed. (2d) 326 (Petitioner's Brief, p. 28), which is one of the class that some Circuit Courts of Appeals consider is not within the rule in the Goodman case. It will be noted that Holbrook's view was wholly obstructed, at the point where he stopped, by a dense fog, which the Court says prevented him from seeing any distance. In distinguishing that case from the Goodman case the Court said:

"Goodman did not stop and look after he had reached a point where he could, and while he could do so effectively. Holbrook after reaching that position did stop, look and listen; he could have taken no precaution in the way of looking which he did not take. It is, of course, true that in such a fog the traveler must exercise a degree of care appropriate thereto; yet where he cannot, by waiting or changing his position, look effectively, then to secure his safety he must rely upon his sense of hearing."

Surely no one can say that petitioner here could not, by changing his position or waiting, have looked and listened effectively. It is stretching the rule too much to try to bring Pokora in broad daylight within the rule applicable to one whose view is wholly obstructed by a dense fog.

Respondent believes the Goodman case states the rule clearly applicable to the facts in this case and that it should be applied here without modification or deviation.

There Is No Evidence to Support the Charge of Willfulness.

It is not disputed that contributory negligence of the plaintiff is no defense to a charge of willfulness, if proved. It is evident that the charge of willfulness was injected into this case in the vain hope that enough proof might be produced to let the case go to the jury on that theory and thus escape the rule of the Goodman case.

Petitioner in his brief, page 23, states that

> "If there be evidence in the record to sustain the allegations of that count, the Court should not have directed a verdict, but the Court should have required the defendant to put in its evidence:"

Petitioner seeks to invoke the state rule of scintilla or modicum of evidence.

That is not the rule in the federal courts, as was recently held in Gunning v. Cooley, 281 U. S. 90, 94; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Garrett v. Pennsylvania Railroad Co., 47 Fed. (2d) 10.

Petitioner in his brief on the petition for certiorari, page 17, under Authorities and Propositions VIII, IX and X, cites cases from Illinois courts which we submit are not even persuasive in the federal courts, and are in conflict with the federal decisions.

He cites no federal authorities which bring the facts in this case within the field of willfulness as decided by the federal courts.

In the willful count (R. 8, 9) the pleader, after detailing the environment in great detail, states that plaintiff's view was wholly obscured by buildings and cars so that

> "just as he drove his automobile onto one of said tracks he saw an engine and train of cars approaching said intersection from the north at a high and dangerous rate of speed, to wit, at a speed of twenty-five miles per hour, but that it was then too late to

stop his car or clear said track on which the train of the defendant was being operated."

Under these allegations, if the driver of the truck saw the train too late to stop, then clearly the engineer on the right-hand or west side of the engine could not see the truck in time to stop, as it came from behind the car on the switch track.

Further, there is not a scintilla of evidence in the record that any servant of respondent saw petitioner in time to stop nor that they intentionally ran into the truck.

The fact that the truck went over the east rail only and did not get to the middle of the track (R. 37, 38), as one witness testified, and the position of the truck and of petitioner after the accident, on the east side of the track (R. 34, 36, 38, 39), show that the engine was close to the crossing when the truck came into view from behind the box car, and that the engineer had no opportunity to prevent the collision.

The testimony of Roland Burris, who lived 150 feet west of the Wabash tracks, that he heard the brakes squeaking on the train (R. 45), and the fact that the train stopped with the rear or north end just over the sidewalk on the south side of the crossing (R. 45, 47), show that the engineer acted promptly and did all he could to stop the train, and disprove the allegations of willfulness and wantonness.

The whole charge of willfulness therefore boils down to

whether or not a speed of twenty-five miles, if proved, without sounding the warnings, was so gross and wanton as to impute willfulness under the federal decisions.

We have shown the Court that there is no evidence in the record as to the speed of the train at the crossing.

The trial court (R. 54) pointed out the slight character of the evidence on speed and then concluded that a speed of twenty to thirty miles per hour in this day and age is even slow and moderate.

The crossing was similar to thousands of intersections in cities where railroads in the due course of business are required to maintain sidetracks and leave cars for loading and unloading at warehouses and other buildings such as those in the instant case.

When we visualize automobiles and large trucks running through residential and business districts at speeds anywhere from twenty to sixty miles per hour, with large buildings flush with the intersections on all corners, with cars and vehicles parked and double parked along the streets, no court, we believe, would hold that a passenger train, with the present demand for rapid transportation, was being operated so as to willfully or wantonly inflict injury when traveling at a rate of from twenty to thirty miles per hour.

In Conrad v. Wheelock, 24 Fed. (2d) 997, at page 998, the Court for the Southern District of Illinois stated the law as to willfulness as follows:

"It must have been intentional, 'or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure,' and not only a failure, but 'after knowledge of the impending danger to exercise ordinary care to prevent it.' In other words, if the engineer here saw and knew the impending danger and peril in which the plaintiff's intestate was situated, just before and at the time of the injury, and then failed to exercise ordinary care to avoid the injury that killed him, that might have been the rule.

"The operation of the rule, 'after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care,' is entitled to consideration."

The Judge who wrote the opinion in the Conrad case was the trial judge in the instant case.

In Blunt v. Chicago, M. & St. P. R. Co., 34 Fed. (2d) 63, there was a willful count which the Court held should be withdrawn from the jury because there was no evidence to support it. The declaration also charged:

"(a) That defendant carelessly and improperly drove, operated and managed its locomotive and train; (b) that it failed to give a reasonable warning by blowing a whistle or sounding a bell * * *; (c) that it operated its locomotive and train at an unreasonable rate of speed commensurate with the character of the crossing and the safety of the plaintiff; (d) that the

view of the railroad was obstructed by trees, weeds, brush and shrubbery which the defendant was under duty to cut."

The Blunt case was tried in the Northern District of Illinois, and at the conclusion of plaintiff's evidence the Court found there was no evidence to sustain a willful charge. The case of Conrad v. Wheelock, 24 Fed. (2d) 996, was cited with approval, and the Goodman case was cited and held to be applicable.

In Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10, there were several counts charging willfulness and wantonness on different grounds, among others failure to sound crossing warnings and excessive speed of train.

The Court held that there was a sharp conflict in the evidence as to failure to sound the statutory crossing warning, sufficient to let the case go to the jury, unless the plaintiff was guilty of contributory negligence. The view was somewhat obstructed and the train was running from sixty to seventy miles per hour.

The Court said:

"There was no evidence upon which the jury could reasonably say that the speed of the train, under all the circumstances, was so excessive and unreasonable as to amount to willful or wanton conduct; nor that there was any intentional failure to sound the statutory warning; nor that there was an intentional fail-

> ure to keep a sharp lookout for travelers about to use the crossing; nor that there was a conscious indifference on the parf of the engineer in relation to these matters. The Court's ruling in this respect is fully supported by the principles enunciated in Conrad v. Wheelock (D. C.), 24 Fed. (2d) 996, and cases cited therein."

The Garrett case was tried in the District Court for the Eastern District of Illinois. We have therefore cited the rule as to willfulness as determined by the Circuit Court of Appeals for the Seventh Circuit and each District Court in Illinois in recent cases involving automobile accidents at grade crossings. The evidence in the Garrett case was much stronger on the question of willfulness, and Judge Alschuler, who dissented in this case, concurred in that.

Under our proposition VIII we have cited cases upon the last-clear-chance doctrine and we refrain from lengthening this brief by a discussion of these cases, but believe they fully support the ruling that there is no evidence in this case to justify the submission of the case to a jury on that doctrine.

We respectfully submit that under the law as administered by the federal courts relative to automobile grade-crossing cases, both in relation to charges of negligence and willfulness, the trial court was not only justified, but

required, to direct a verdict for the defendant in the instant case, and that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

WALTER M. ALLEN,
N. S. BROWN,
Counsel for Respondent.

HENRY A. CONVERSE,
HOMER HALL,
Of Counsel.

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MAR 16 1934
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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

No. 585.

JOHN POKORA, Petitioner,

vs.

THE WABASH RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

ADDITIONAL BRIEF OF RESPONDENT.

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ADDITIONAL BRIEF OF RESPONDENT.

ADDITIONAL BRIEF OF RESPONDENT.

On the oral argument of this case the petitioner was granted leave to have sent to the court a plat which was submitted to the Circuit Court of Appeals by petitioner upon the argument of the case in that court, which plat counsel for petitioner states was a copy of a plat offered in evidence on the trial of the case, but which was not incorporated in the bill of exceptions or in the transcript filed in the Circuit Court of Appeals, or in the transcript filed in this court, as respondent pointed out in its brief filed in this court on or before February 10, 1934. Counsel for the petitioner stated to the Court during the argument that he would have the original plat which was offered in evidence in the District Court sent to counsel for respondent to be used in connection with respondent's additional brief, which the Court granted respondent leave to file.

Counsel for respondent received from the Clerk of the United States District Court at Springfield, Illinois, a plat which is marked "Pl't'f. Ex. No. One. 6/22/32. L. M. J.," which plat is being forwarded to the clerk of this court with the respondent's additional brief. The respondent has reproduced from the said original Exhibit No. 1 a portion thereof, marked "Plat A," showing the place of the accident with the distances and locations of tracks, streets, curb lines, sidewalk, grass plot and buildings exactly as they appear upon petitioner's said Exhibit No. One, and has added to that reproduction the vision lines from two

points in Edwards street, so that said plat A, inserted opposite this page, shows the following:

(a) At a point marked with the figure 1 in a circle, seven feet and six inches south of the north curb line of Edwards street and ten feet east of the east rail of the switch track, the locomotive approaching on the main track could have been seen by petitioner 62 feet north of the point of the collision, if the south end of the box car on the switch track was five feet north of the north line of the north sidewalk at the point marked "A" in a circle.

(b) At the same point 1, the locomotive could have been seen by petitioner a distance of 67 feet north, if the south end of the box car was ten feet north of the north line of the north sidewalk, at the point marked B in a circle. These vision lines from point 1 are shown in yellow on the plat A.

(c) At the point marked by the figure 2 in a circle, seven feet six inches south of the extended north curb line of Edwards street and ten feet east of the east rail of the main track, the locomotive could have been seen by petitioner a distance of 129 feet north of the point of the collision, with the south end of the box car five feet north of the north line of the north sidewalk at point A.

(d) At the same point 2, the locomotive could have been seen by petitioner on the main track 143 feet north of the point of the collision, with the south end of the box car ten feet north of the north line of the north sidewalk, at point B. The vision lines from point 2 are shown in red on the plat.

"Reproduction Plaintiff's Exhi

L

① a point 7 ft. 6 inches South

② a point 7 ft. 6 inches South

Ⓐ = End of Freight car 5 ft

Ⓑ = End of Freight car 10 ft.

Vision Lines from point

Vision Lines from point

Ice Service Station

Platform

129'

WABASH R.R

Switch Ti

STREET

Switch

MAIN

67'

62'

8'

8'

17'-6"

C.I.P. Co.

Ice Plant

(Brick Building)

Sidewalk

Drive

25'

O pole

Curb level with Pavement

Grass Plot

7'-6"

7'-6"

Board plank Crossing

10'

10'

Macadam Pavement

EDWARDS STREET

Paved with Brick

30'

80'

End of Brick Pavement

Fire Hydrant

Curb Line

Poles

Crossing Sign

Grass Plot

38'

Cinder Walk

Switch

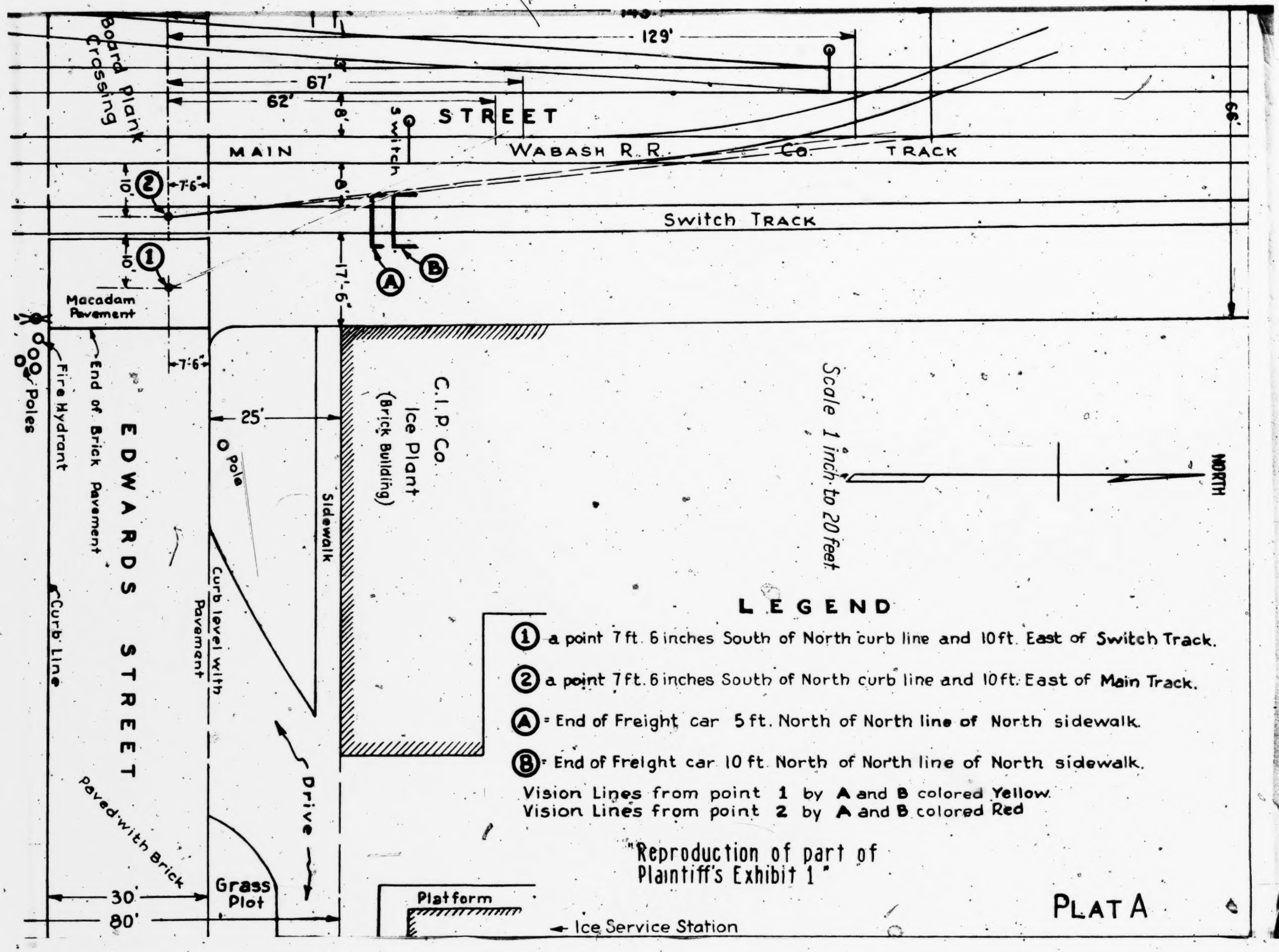
Switch Track

TENTH

Siding

Metal Storage Building

66"



LEGEND

(1) a point 7 ft. 6 inches South of North curb line and 10 ft. East of Switch Track.

(2) a point 7 ft. 6 inches South of North curb line and 10 ft. East of Main Track.

(A) = End of Freight car 5 ft. North of North line of North sidewalk.

(B) = End of Freight car 10 ft. North of North line of North sidewalk.

Vision Lines from point 1 by A and B colored Yellow.
Vision Lines from point 2 by A and B colored Red

"Reproduction of part of Plaintiff's Exhibit 1"

PLAT A

of approximately two and a half feet, which may be assumed as approximately the overhang of the engine. The dimensions of the petitioner's $1,500 Federal truck, bought two years before the injury, are not shown by the record, but information furnished by a representative of the manufacturer has enabled us to assume that the truck was approximately five feet and seven inches wide, and that as petitioner was sitting on the south side of it he would be approximately seven and a half feet south of the north curb, and that the dash or front of the cab of the truck in which petitioner was sitting, was approximately four feet and six inches back of the front bumper of the truck.

The testimony of the witnesses as to the location of the box car on the switch track varies, and therefore two positions are taken, one five feet and the other ten feet north of the north edge of the sidewalk.

The witness Ushman, who was driving his car right behind petitioner, testified with respect to the location of the cars on the switch track as follows:

> "I first noticed those cars when I stopped there, waiting for him (petitioner) to get away so I could go across. They were right about eight or ten feet from the sidewalk" (R. 35).

The witness Roland Burris testified, on redirect examination by Mr. Wines, as follows:

> "I noticed freight cars standing on the east track that morning. (Plat shown to the witness.)

Q. Can you show me on this plat how close they were to the corner?

A. It was just about along here (indicating).

Q. That is, your finger is about half an inch from this dotted line showing the building line; is that right?

A. Just a little west past the plant.

Recross-Examination, by Mr. Converse.

I think the freight cars were about six or eight feet from the sidewalk line, but I did not measure" (R. 46).

The plat on which counsel say that the witness was indicating the place the cars were located, about half an inch from the building line, was drawn to a scale of one inch equals twenty feet (see plat), and, therefore, one-half inch on the plat would equal ten feet, although the witness estimated the distance as about six or eight feet.

The witness Clarence Stanberry testified:

"There are always box cars or freight cars standing on the east track there on the north side of Edwards street. They were standing there that morning; I would judge the last car wasn't over four or five feet back" (R. 51).

The testimony of the petitioner's witnesses that the box cars were from five to ten feet north of the north edge of the north sidewalk cannot be disregarded (Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 216, 217; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341).

The point 1, seven feet six inches south of the north curb line and ten feet east of the east rail of the switch track, has been taken as the point where respondent believes it fairly appears from the evidence the petitioner was sitting in his truck when he stopped. The petitioner and the witness Ushman testified that petitioner stopped his truck ten or fifteen feet east of the switch track (R. 32, 34, 35). The distance of seven feet six inches from the north curb line, being one-half the distance between the north curb line and the center of the street, has been taken for the reason that the petitioner testified that he was "going alone on the north side of Edwards street near the north curb and was looking straight west," and that he "was sitting on the south side of the cab" of the truck (R. 32). The witness Ushman testified that petitioner "was driving on the north side of the street as he approached the Wabash tracks" (R. 34), and "was sitting on the left-hand side" of the truck (R. 35).

The point 2 was taken seven feet six inches south of the north curb line for the same reason as point 1, and was taken ten feet east of the east rail of the main track, for the reason that the truck would have been safely in the clear of the engine and train on the main track. While the width of the car on the sidetrack is not shown by the testimony, a width of ten feet was assumed, as general published records of railway equipment show that the width of the great majority of freight cars is less than ten feet. This would give an overhang outside the rail

None of the witnesses who saw the accident testified as to the speed of the train. Mike Ushman was in his automobile, right behind the petitioner. The petitioner (Petition for Writ, p. 7) states that Ushman testified, "that the back end of the train ran five or six hundred feet south of the Edwards street crossing before it stopped." The testimony of the witness was: "I guess the back end of the last coach was five or six hundred feet south of the Edwards street crossing" (R. 34). On cross-examination the witness testified: "I really do not know where the train did stop" (R. 35). The distance the train ran after the accident, with nothing more, would not prove the rate of speed.

Henry Roy was driving his automobile a short distance behind the petitioner, and testified: "I guess he didn't get in the middle of the track until the crash came." He then testified that he could not tell how fast the train was running (R. 38).

Henry Buckholdt, a boy almost twelve years of age at the time of the trial, testified that he was some distance east of the crossing and saw the train come along, and saw the accident (R. 36).

Clarence Stanberry did not see the train until after it stopped, but was asked to give his best judgment as to how fast it was running. He stated he could not give an estimate, but started to give a conclusion from the distance of the train down the track when it stopped. An objection to such testimony was sustained (R. 51).

The only evidence in the case relating to the speed of the train was the testimony of the witness Hodges, who was at his desk at the Springfield Produce Company, at the northeast corner of Tenth and Capitol avenue. The next street south of Capitol avenue is Jackson, and the next Edwards, that is, the witness was two blocks and the width of two streets, Capitol avenue and Jackson, north of the scene of the accident. The depot is on Tenth street. Washington is at the south end of the station, the next street is Adams, the next Monroe, and the next Capitol, where the witness worked. That is three blocks and across three streets from the depot to the place the witness was sitting at his desk, and looking through an open door about three and a half or four feet wide he saw the train pass and estimated it was running twenty-five or thirty miles an hour. There was some testimony tending to show that the train had stopped at the depot, for this witness testified as follows: "I mean to tell the jury that this train had started at the station and in running three blocks had gotten up a speed of twenty-five or thirty miles an hour."

His testimony definitely shows that it was the usual custom for the train to stop because he testified that he had taken the train hundreds of times and knew the time it was due at Springfield, and for that reason thought it was late on this morning. He said, "Very seldom it was on time; many a time I have waited for that train" (R. 50).

It may well be doubted whether the train gained a

speed of twenty-five or thirty miles an hour in going that short distance.

Evidence as to the speed of the train at Edwards street is therefore wholly lacking, and the testimony of the one witness who saw the train two blocks and across two streets north of Edwards street is so insubstantial and insufficient that it did not justify the submission of that issue to the jury under either count of the declaration (Southern Railway Co. v. Walters, 284 U. S. 190, 194; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333).

There was no direct evidence that there was no locomotive on the switch track, except the testimony of the witness Hodges at the Produce Company's office, that he telephoned to petitioner, who was a customer of his company, to see if he needed any produce, and his wife told him petitioner "got hit with the Wabash." He called about 6:10 or 6:20. He testified, "She told me he was hit at Tenth and Edwards and I figured it was the Wabash train. **That is the only train that could have hit him.**" This witness was two blocks and across two streets north of the place of the accident and twenty-five feet from the train as it passed (R. 48, 49). This witness testified:

> "From Washington street to Edwards street there are warehouses, depots and storage houses all the way down. Those business houses are built there so they can be on sidetracks. We have a sidetrack. I don't know whether it is the same way down at the C. I. P. S. ice house" (R. 50).

The testimony whether the train was on time was conflicting. Mrs. Burris, who lived on the north side of Edwards street, and about 150 feet west of the Wabash tracks (R. 45, 46), testified:

> "I just heard the train coming and never thought to look up. I knew it went through; it was on time that day. I could hear the train rumbling down the track as it came from the north towards Edwards street". (Abs. 47, 48).

The attention of the Court is again called to the erroneous statement in the petition for the writ (page 9) that "the witness (Goetz) waved him (petitioner) on across the tracks as that platform was crowded (Tr. 39)." This would create the impression that petitioner was given some assurance of safety in crossing the tracks.

The testimony of the witness Goetz was as follows:

> "Pokora was in the habit of getting ice there in the mornings. He stopped there at the corner of the engine room to try to get a load of ice on the east side of the railroad track. Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes" (R. 39).

The witness also testified:

> "The wholesale platform where I was standing is about forty feet north of the sidewalk and on the east

side of the C. I. P. S. ice plant. This is where I stopped Pokora" (R. 40).

In addition to this the petitioner testified:

> "There wasn't any crossing watchman there. Nobody signaled nothing. Nobody gave me any motion to come on" (R. 33).

The statement that from the position of Goetz, on the east side of the brick building, more than one hundred feet east of the main track, as is indicated by the plat, and forty feet north of the sidewalk, the witness waved petitioner on across the tracks, is difficult to reconcile with a careful desire to accurately state the facts.

Counsel for the petitioner in his petition for the writ and apparently in oral argument contended that if the petitioner was entitled to have the case submitted to the jury it was on the third count of the declaration alleging willfulness under the rule applied in the courts of Illinois. The weakness in that contention is that this case involves a principle of general law, which must be determined and applied according to the rule and doctrine prevailing in the courts of the United States.

Federal courts in determining questions of general law are not controlled by state court decisions. Since the decision in Swift v. Tyson, 16 Pet. 3, 10 L. Ed. 865, it has been the settled general doctrine of the federal courts that they will themselves determine without regard to the decisions

of the highest courts of the state all general questions of the common law.

In Herron v. Southern Pacific Co., 283 U. S. 91, the Court, at page 93, said:

> "It does not appear to be insisted by the appellant, and it could not be maintained, that this constitutional provision must be followed by the federal courts by virtue of the Conformity Act (U. S. C., Tit. 28, Sec. 724). The state, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (Chicago, Rock Island & Pacific Ry. Co. v. Cole, 251 U. S. 54, 56), but, in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a 'form' or 'mode of proceeding.' The provision 'cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the Court, upon a proven state of facts' (Atchison, Topeka & Santa Fe Ry. Co. v. Spencer, 20 F. [2d] 714, 716). Even with respect to the burden of proof as to contributory negligence, this Court has said: 'But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. * * * But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle, even in trials in states which hold that the burden is on the

plaintiff.' (Central Vermont Ry. Co. v. White, 238 U. S. 507, 512). See, also, Beutler v. Grand Trunk Junction Ry. Co., 224 U. S. 85, 88."

The rule also is fully discussed and clearly stated in Black & White Taxicab & Transfer Co. v. Yellow & Brown Taxicab & Transfer Co., 276 U. S. 518.

There are scores of cases which state and apply this rule, but to cite them is unnecessary.

The federal courts do not recognize the rule as to willfulness as stated in the Illinois cases cited by petitioner.

If the allegations in the third count of the declaration state facts which would constitute a right of action recognized in the federal courts, it could only be under the last-clear-chance doctrine. But respondent contends that the last-clear-chance doctrine is not applicable to the facts set out in the declaration in this case, and that there was a total failure to prove liability under that rule.

In the case of Kansas City Southern Railway v. Ellsey, 275 U. S. 236, the Court at page 241, referring to the opinion of the court below, said:

"This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case (207 U. S. 302), amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity

than the plaintiff to avert an accident (Grand Trunk Ry. v. Ives, 144 U. S. 408, 428; Inland and Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558). In the cases applying the rule the parties have been engaged in independent courses of negligent conduct. The classic instance is that in which the plaintiff had improvidently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle (Davis v. Mann, 10 M. & W. 546). It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later."

In Chunn v. City & Suburban Railway, 207 U. S. 302, the Court, at page 309, said:

"If she (plaintiff) carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The converse of this rule is true; that is, if the petitioner placed himself in a position of danger, which was not known or discovered by the defendant, then the petitioner failed to make a case for the jury, and it was the duty of the Court to direct a verdict for the defendant, as was done in this case.

In Woloszynowski v. N. Y. C. R. R. Co., 254 N. Y. 206, in the opinion by Chief Judge Cardozo, now Mr. Justice Cardozo, after stating the facts, it was said:

"In such circumstances a recovery in favor of the plaintiff, if sustainable at all, must rest upon the doctrine of 'the last clear chance.'

"The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences (citing case). Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (citing case), but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge."

The decisions of this Court support the contention that there was no evidence that required or that would have justified the submission of the case to the jury on the third count of the declaration; that is, that respondent was guilty of willfully inflicting the injury upon the petitioner.

The Court, in Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339, said:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

The petitioner did not plead or attempt to prove that

defendant had violated or failed to comply with any statute of Illinois, any ordinance of the City of Springfield, or any order, rule or regulation of the Commerce Commission of the state relating to speed of the train or the maintaining of crossing gates or a crossing watchman. It may be assumed that if there were any such restriction or requirement the petitioner would have pleaded it. It may also be assumed that if any such restrictions or requirements were considered necessary by the public authorities they would have been made.

The undisputed evidence furnished by petitioner shows that petitioner was guilty of a reckless disregard for his own safety.

Every fact and circumstance which confronted and was then apparent to the petitioner as he approached the main track imperatively demanded that he exert increased care and vigilance, for he knew that when he stopped east of the switch track his view was obstructed by the box cars. But instead of being more careful he disregarded every requirement of safety and caution and neither stopped, looked nor listened, but, as he himself says, looked straight west and drove on the track, where he knew the train was likely to pass, for he testified: "I had seen that train go through many times on other days. Sometimes it blew whistle and sometimes not" (R. 31).

An examination of the plat introduced in evidence as Plaintiff's Exhibit No. One and the plat A incorporated in this brief shows that when petitioner stopped ten feet

east of the switch track, sitting on the south side of his truck at a distance of seven feet and six inches from the north curb line; if the box car was only five feet north of the north line of the sidewalk, it was thirty-seven and a half feet north of him and he could then have seen a distance of sixty-two feet along the main track north of the point of collision.

It is perfectly apparent that as he traveled west his range of vision to the north rapidly increased and that the train, if moving at twenty-five or thirty miles an hour, came into his range of vision soon after he started his truck and before he reached a point ten feet east of the main track.

The petitioner did not plead nor prove any excuse for failing to stop or look at a point where he could have seen the train, as he undoubtedly could have done when he was more than ten feet east of the main track. He did not allege or attempt to prove and does not now contend that he did not stop on the switch track because he feared the cars on that track might be moved and strike his truck. That suggestion and contention is made for the first time in the dissenting opinion in the Circuit Court of Appeals.

Petitioner, in effect, disavows that as an excuse for not stopping his truck on the switch track, where he could have seen the train, and apparently concedes that he stopped east of the switch track for the purpose of seeing whether there was danger in going upon that track. On page 20 of the petition for the writ he says: "Appellant

stopped his car before driving onto the east track, which was the sensible thing to do, because if an engine had been attached to the cars on the sidetrack and had started to back them south while plaintiff was on that track, he would have had no possible chance to save himself."

The cases cited in petitioner's brief and in the dissenting opinion as distinguishing the Goodman case are all clearly distinguishable from the facts in that case and from the facts in this case. In Ches. & O. Ry. Co. v. Wade, 25 F. (2d) 366, the accident happened at night. The rule in the Goodman case was approved, but the facts were held to be substantially different. In Canadian Pac. Ry. Co. v. Slayton, 29 F. (2d) 687, the accident happened about midnight. The crossing gates were up. There was no watchman and no sign stating that the gates were not in operation at midnight. The deceased was not familiar with the crossing. In Luethold v. Penna. R. Co., 33 F. (2d) 758, it was customary to have a flagman at the crossing, which distinguished that case from the Goodman case. In Teague v. St. L. S. W. Ry. Co., 36 F. (2d) 217, plaintiff was not familiar with the crossing. An electric gong at the crossing was silent and had been out of repair for three weeks, and no notice was posted that the gong was not operated. The plaintiff relied upon the gong. The train was coasting quietly and there were tank cars which obstructed the view.

In Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, the suit was based on the alleged running of a train in excess of

the speed permitted by an ordinance of the City of Detroit, and the Court held that "such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

It is a strange and illogical contention that petitioner urges the Court to approve that, as the danger at a crossing increases, the care which the engineer should exercise increases, but the care which the automobile driver should exercise decreases. There is neither law nor logic in such a contention.

Petitioner is in no position to complain that the Court, in Baltimore & Ohio R. v. Goodman, ruled that there might be circumstances in which the driver would be required to get out of his automobile and go forward, for he wholly failed to take the precautions which are required by all courts, federal and state, at all times, day or night, and at all places, in city or country, that the driver must look and listen, and, if necessary to see and hear effectively, he must stop his automobile.

In the case of Miller v. Union Pacific R. R. Co., ... U. S. ..., decided by this Court December 4, 1933, it was held that the contributory negligence of the driver of the automobile was clearly established under the general rule frequently stated by this Court. While the facts in that case are different from the facts in this case, and the driver in that case had better opportunity to see the approaching

train, yet the rule stated in that case, if applied to the facts in this case, would seem to require the same ruling in this case as in that. We quote from the decision in that case as follows:

> "We need do no more than refer to the case of Northern Pacific Railroad v. Freeman, 174 U. S. 379, where a person killed by a moving train at a railroad crossing well known to him, with the coming train in full view which he could have seen while forty feet distant from the track if he had looked, was held guilty of contributory negligence, because, putting aside the oral testimony, these facts demonstrated that either he did not look or took the chance of crossing before the train reached him. 'When it appears,' the Court said (pp. 383-384), 'that if proper precautions were taken they could not have failed to prove effectual, the Court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken. * * * Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.' Authority for this view was found especially in Railroad Co. v. Houston, 95 U. S. 697, 702."

There is no problem requiring solution or inference in this case, for the petitioner himself testified that he "looked straight west," that he never saw the train,

although it was certainly in plain view before he reached the danger point, and he did not even know what hit him. There could be no clearer evidence of contributory negligence, established by petitioner's own evidence.

In Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, the Eighth Circuit Court of Appeals, in a crossing accident case, the Court (p. 803) said:

> "* * * The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track (Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield v. Chicago etc. Ry., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Fletcher v. Atlantic & Pacific R. R. Co., 64 Mo. 484)."

On page 804 the Court said:

> "* * * If the plaintiff had stopped his horses just before he drove them into their dangerous position, stilled the noise of their feet, of the wagon and of the brakes, and then listened, he would probably have heard the approaching train and have escaped his injury. If he had stepped off his wagon and gone to the track before them, and looked to the east, he would certainly have seen the coming train. Looking where he could not see it and listening while other noises prevented his hearing it were futile. It is no more the exercise of ordinary care to look and listen when and where looking and listening are useless than

it is to fail to look and listen where looking and listening would be effective."

In Dean v. Chicago, B. & Q. R. Co., 211 Iowa 1347, l. c. 1350, the Court said:

"In the High case, supra (High v. Waterloo, C. F. & N. R. Co., 195 Iowa 304, 190 N. W. 331, 333), it is said: 'It is always train time at any railroad crossing,' but that 'cases may arise where, under the proven facts, the person injured has so failed to act as a man of ordinary care and prudence that the Court must hold as a matter of law that he has been guilty of contributory negligence. * * * Under certain circumstances it may be negligence for him not to stop in order to listen for a train.'

"It must be conceded that at an obstructed crossing it is the duty of the traveler to exercise a greater degree of care and caution than is incumbent upon him usually, and that there may be such circumstances in a given case that common prudence requires the traveler to stop. It is elementary that the greater the danger the greater the care and caution necessary for him to exercise to constitute ordinary or reasonable care. Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him. The traveler may have the right, as a general rule, to rely on the fact that a railroad company will perform its duty, either at common law or under the statute, in the operation of its train, but this fact, per se, does

not dispense with the care to be exercised by the traveler, and he may be guilty of contributory negligence under the facts of the particular case to the contrary notwithstanding. Each case must be determined upon its own particular facts. The instant plaintiff knew that he was in a zone of danger. He was acquainted with all of the facts of his environment when he approached the tracks of the defendant railroad company. True, it is the rule ordinarily that the question involved herein must be left to the answer of the fact-finding body. The case of Hawkins v. Interurban Ry. Co., 184 Iowa 232, 168 N. W. 234, is distinguishable on the factual side from the case at bar. The instant case presents the exception to the general rule.

"This private crossing was exceptionally dangerous because trains approaching it from the west came through a deep cut, which did obscure from the view the engine in question, and did deaden somewhat the noise of its approach. The presence of weeds and brush obscured a train from the view of a traveler from the south, and no traveler in an automobile coming from the south to the tracks could see a train approaching from the west until the driver had propelled his automobile almost onto the tracks themselves, and could then see but forty to sixty feet to the west of him. The road approaching the track was rough and rutty, and steep enough that it required the plaintiff to shift from high gear to intermediate, so his car could be propelled to and over the tracks. Plaintiff, with the absolute knowledge of all these facts, knew that if he looked to the west he could not see an approaching train. Furthermore, we may take

judicial notice that a car shifted from high to intermediate gear does create and make additional noise in its operation after the shift is made. This fact would interfere somewhat with plaintiff's hearing the approach of a train. The fact is, however, that he did not stop, and the fact stands that, had he looked to the west all of the time while approaching the tracks, he could not have seen anything until his car was on, or nearly on, the tracks. Plaintiff must have known, under the circumstances, that if he did not stop and a train was approaching, which he could not see and could not hear, a collision would be inevitable.

"We hold, therefore, that the plaintiff was guilty of contributory negligence as a matter of law, and the trial court erred in overruling defendant's motion for a directed verdict."

In the case of Henderson v. St. Louis-San Francisco Railway Company, 314 Mo. 414, the Court, at page 437, said:

"The duty of plaintiff was not performed by attempting to look only from the point at which his view was obstructed (Kelsay v. R. R. Co., 129 Mo., l. c. 372). 'One approaching a railroad crossing knows that he is approaching danger, and must act in accordance with that knowledge, and in accordance with the rule of ordinary care to protect himself from danger. What is ordinary care upon his part under one state of facts might not be ordinary care under other and different facts. If objects obstruct his view, or noises interfere with his hearing, his conduct must meet these conditions before he has exercised

ordinary care for his own protection under the circumstances surrounding him' (State ex rel. Hines v. Bland, 237 S. W., l. c. 1019). There was required of the plaintiff a care commensurate with the obstructions to his view and to his hearing, before going upon a track whereon he knew trains were coming and going at almost any hour.

"Under the circumstances and under what the plaintiff himself said that he knew, we are forced to the conclusion that he did not exercise the care of an ordinarily prudent person, and for that reason the judgment should be affirmed."

Under the rule stated in these cases, as well as those cited in respondent's original brief, and under the undisputed evidence introduced by the petitioner in this case, the respondent believes that the judgments of the lower courts were correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 585.—October Term, 1933.

John Pokora, Petitioner, *vs.* The Wabash Railway Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 2, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

John Pokora, driving his truck across a railway grade crossing in the city of Springfield, Illinois, was struck by a train and injured. Upon the trial of his suit for damages, the District Court held that he had been guilty of contributory negligence, and directed a verdict for the defendant. The Circuit Court of Appeals (one judge dissenting) affirmed, [66 F. (2d) 166], resting its judgment on the opinion of this court in *B. & O. R. Co.* v. *Goodman*, 275 U. S. 66. A writ of certiorari brings the case here.

Pokora was an ice dealer, and had come to the crossing to load his truck with ice. The tracks of the Wabash Railway are laid along Tenth Street, which runs north and south. There is a crossing at Edwards Street running east and west. Two ice depots are on opposite corners of Tenth and Edward Streets, one at the northeast corner, the other at the southwest. Pokora, driving west along Edwards Street, stopped at the first of these corners to get his load of ice, but found so many trucks ahead of him that he decided to try the depot on the other side of the way. In this crossing of the railway, the accident occurred.

The defendant has four tracks on Tenth Street, a switch track on the east, then the main track, and then two switches. Pokora, as he left the northeast corner where his truck had been stopped, looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of the switch ahead of him. A string of box cars standing on the switch, about five to ten feet from the north line of Edwards Street, cut off his view of the tracks beyond him to the north. At the same time he listened. There was neither bell nor whistle. Still listening, he crossed the switch, and reaching the main track was struck by a passenger train

coming from the north at a speed of twenty-five to thirty miles an hour.

The burden of proof was on the defendant to make out the defense of contributory negligence. *Miller* v. *Union Pacific R. Co.*, 290 U. S. 227, 232. The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop. A space of eight feet lay between the west rail of the switch and the east rail of the main track, but there was an overhang of the locomotive (perhaps two and a half or three feet), as well as an overhang of the box cars, which brought the zone of danger even nearer. When the front of the truck had come within this zone, Pokora was on his seat, and so was farther back (perhaps five feet or even more), just how far we do not know, for the defendant has omitted to make proof of the dimensions. Nice calculations are submitted in an effort to make out that there was a glimpse of the main track before the switch was fully cleared. Two feet farther back the track was visible, it is said, for about 130 or 140 feet. But the view from that position does not tell us anything of significance unless we know also the position of the train. Pokora was not protected by his glimpse of 130 feet if the train at the same moment was 150 feet away or farther. For all that appears he had no view of the main track northward, or none for a substantial distance, till the train was so near that escape had been cut off. Cf. *Dobson* v. *St. Louis S. F. Ry. Co.*, 223 Mo. App. 842, 822; *Turbet* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 164 Minn. 335, 341.

In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. Cf. *Norfolk & W. Ry.* v. *Holbrook*, 27 F. (2d) 326. Pokora made his crossing in the day time, but like the traveler by night he used the faculties available to one in his position. *Johnson* v. *Seaboard Air Line R. Co.*, 163 N. C. 431; *Parsons* v. *Syracuse, B. & N. Y. R. Co.*, 205 N. Y. 226, 228. A jury, but not the court, might say that

with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross. The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle. *L. & N. R. Co.* v. *Summers*, 125 Fed. 719, 721; Illinois Revised Statutes, (1933 ed.), c. 114, ¶ 84.[1] Indeed, the statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. *Wright* v. *St. Louis S. F. Ry. Co.*, 327 Mo. 557, 566; *Hires* v. *Atlantic City R. Co.*, 66 N. J. L. 30; *Cordell* v. *N. Y. C. & H. R. R. Co.*, 70 N. Y. 119. All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men. *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 417; *Flannelly* v. *Delaware and Hudson Co.*, 225 U. S. 597.

The argument is made, however, that our decision in *B. & O. R. Co.* v. *Goodman*, *supra*, is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible.[2] With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a

[1] The Illinois Act provides: "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

[2] For a full statement of the facts, see the opinion of the Circuit Court of Appeals, 10 F. (2d) 58, 59.

train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

There is need at this stage to clear the ground of brushwood that may obscure the point at issue. We do not now inquire into the existence of a duty to stop, disconnected from a duty to get out and reconnoitre. The inquiry, if pursued, would lead us into the thickets of conflicting judgments.[3] Some courts apply what is often spoken of as the Pennsylvania rule, and impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side. See e. g., *Benner* v. *Philadelphia & Reading R. Co.*, 262 Pa. 307; *Thompson* v. *Pennsylvania R. Co.*, 215 Pa. 113; *Hines* v. *Cooper*, 205 Ala. 70; cf. *Pennsylvania R. Co.* v. *Yingling*, 148 Md. 169. Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury. See, e. g., *Judson* v. *Central Vermont R. Co.*, 158 N. Y. 597, 605, 606, and cases cited; *Love* v. *Fort Dodge R. Co.*, 207 Iowa 1278, 1286; *Turner* v. *Minneapolis R. Co.*, *supra*; *Wisconsin & Arkansas Lumber Co.* v. *Brady*, 157 Ark. 449, 454; cf. *Metcalf* v. *Central Vermont R. Co.*, 78 Conn. 614; *Gills* v. *N. Y. C. & St. L. R. Co.*, 342 Ill. 455. The subject has been less considered in this court, but in none of its opinions is there a suggestion that at any and every crossing the duty to stop is absolute, irrespective of the danger. Not even in *B. & O. R. Co.* v. *Goodman*, *supra*, which goes farther than the earlier cases, is there support for such a rule. To the contrary, the opinion makes it clear that the duty is conditioned upon the presence of impediments whereby sight and hearing become inadequate for the traveler's protection. Cf. *Murray* v. *So. Pacific Co.*, 177 Cal. 1, 10; *Williams* v. *Iola Electric R. Co.*, 102 Kan. 268, 271.

Choice between these diversities of doctrine is unnecessary for the decision of the case at hand. Here the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of

[3]The cases are collected in 1 A. L. R. 203 and 41 A. L. R. 405.

clearance had been reached. See, e. g., *Dobson & St. Louis S. F. Ry. Co., supra.* For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he remained seated on his truck, or so the triers of the facts might find. His case was for the jury unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds. *Grand Trunk Ry. Co. v. Ives, supra.*

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as every day experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. See, e. g., *Torgeson* v. *Missouri-K-T R. Co.*, 124 Kan. 798, 800, 801; *Dobson* v. *St. Louis S. F. R. Co., supra; Key* v. *Carolina & N. W. R. Co.*, 150 S. C. 29, 35; *Georgia Railroad & Banking Co.* v. *Stanley*, 38 Ga. App. 773, 778. Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting

out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. *Dolan* v. *D. & H. C. Co.*, 71 N. Y. 285, 288, 289; *Davis* v. *N. Y. C. & H. R. R. Co.*, 47 N. Y. 400, 402. The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states.[4] We limit it accordingly.

The judgment should be reversed and the cause remanded for further proceedings in accordance with this opinion.

It is so ordered.

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[4] Many cases are collected in 43 Harvard Law Review 926, 929, 930, and in 56 A. L. R. 647.

See also: Dobson *v.* St. Louis S. F. R. Co., *supra*; Key *v.* Carolina & N. W. R. Co., *supra*; Gills *v.* N. Y. C. & St. L. R. Co., *supra*; Georgia Railroad & Banking Co. *v.* Stanley, *supra*; Miller v. N. Y. C. R. Co., 226 App. Div. 205, 208; 252 N. Y. 546; Schrader *v.* N. Y. C. & St. L. R. Co., 254 N. Y. 148, 151; Dolan *v.* D. & H. C. Co., *supra*; Huckshold *v.* St. L., I. M. & S. R. Co., 90 Mo. 548. Contra: Koster *v.* Southern Pacific Co., 207 Cal. 753, 762; Vaca *v.* Southern Pacific Co., 91 Cal. App. 470, 475; Davis *v.* Pere Marquette R. Co., 241 Mich. 166, 169; cf. Torgeson *v.* Missouri-K-T R. Co., *supra*.